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DISCRETIONARY TRUSTS.

Where a will gives an estate to one to use the income to satisfy his own needs and comforts, and to apply the residue to the use of certain other persons, have these latter persons any interest in the will which they can enforce?

The recent case of Prince v. Barrow, 48 S. E. Rep. 412, serves to enlighten the profession on this very interesting and important question. In that case the testator bequeathed and devised all his property to his wife, "for and during her natural life, with the condition" that "she shall apply" a designated portion of the annual income thereof to her own use, "and the residue of it to the following (*a*) such part of it as may be necessary to the support of [his] sister, * * * so long as she shall live * * * (*b*) so much of it as to her may seem proper to be allotted to the assistance of the children or grandchildren of [such] sister and (*c*) the remainder to be divided into three equal parts for distribution between" his two living children "and the children or descendants of [his] deceased son." The court held that on the death of the testator, his whole property became a trust estate during the life of his widow, to be held and administered by her as such in accordance with the directions of the will; that is, to first apply the designated portion of the annual income to her own use, and if the children or grandchildren, or either of them, of the testator's sister, need assistance, to allot to them so much of the remainder of such income, as, in the exercise of a fair and honest discretion, may to her seem proper for this purpose, and then to divide the residue of the income, *per stirpes*, among his two living children, and the descendants of his deceased son. The court in the course of an interesting opinion said:

"Is the trust sought to be established under this will, incapable of execution, in conseqence of uncertainty as to extent of assistance to be rendered, and because it involves discretionary power on the part of the intended trustee, which a court of equity has no rightful power to assume and exercise? This is the question which has given us most trouble, and upon which we have spent much time in investigation and deliberation.

In Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. Rep. 1164, 32 L. Ed. 138, the will under o nsideration contained the following provisions: 'I give and bequeath to my said wife * * * all of the estate, real and personal, of which I shall die seized, possessed, or entitled to. I recommend to her the care and protection of my mother and sister, and request her to make such gift and provision for them as in her judgment will be best.' The testator's widow failed and refused to make any provision for his mother and sister. In proceedings instituted by them against her, the Supreme Court of the United States construed the precatory language as being, in effect, imperative, and held that the mother and sister of the testator 'took under the will a beneficial interest in the estate given to the wife, to the extent of a permanent provision for them during their respective lives, suitable and sufficient for their care and protection, having regard to their condition and necessities, and the amount and value of the fund from which it must come; that it was the duty of the court to ascertain, determine, and declare what provision would be suitable and best, under the circumstances, and all particulars and details for securing and paying it.' In delivering the opinion, Mr. Justice Matthews said: 'But it is argued that the trust sought to be established under this will in favor of the complainants is incapable of execution, by reason of the uncertainty as to the form and extent of the provision intended, and because it involves discretionary power on the part of the trustee, which a court of equity has no rightful power to control. We have seen that whatever discretion is given by the will to the testator's widow does not affect the existence of the trust. [The same may be said in the case we now have under consideration.] That discretion does not involve the right to choose whether a provision shall be made or not, nor is there anything personal or arbitrary implied in it. It is to be the exercise of judgment directed to the care and protection of the beneficiaries by making such provision as will best secure that end. There is nothing left in this so vague and indefinite that it cannot, by the usual processes of the

law, be reduced to certainty. Courts of common law constantly determine the reasonable value of property sold, where there is no agreement as to price; and the judge and jury are frequently called upon to adjudge what are necessaries for an infant, or reasonable maintenance for a deserted wife. The principles of equity and the machinery of its courts are still better adapted to such inquiries. In the exercise of their discretion over trusts and taustees, it is a fundamental maxim that no trust shall fail for the want of a trustee; and where the trustee appointed neglects, refuses, or becomes incapable of executing the trust, the court itself in many cases will act as trustee.'

In Dexter v. Evans, 63 Conn. 58, 27 Atl. Rep. 308, 38 Am. St. Rep. 336, it was held that 'a will by which a testator makes a bequest to his wife in lieu of dower, and then gives her four separate legacies "for her to help as she sees fit" each of four persons named, at her decease the residue of said legacies "to go to W," who will do by said four persons as he sees fit, and see that they are comfortably provided for during their lifetimes, "unless my wife sees fit to make a will and dispose of the remainder of these legacies differently, then they go as she wills," 'followed by a clause giving the wife another legacy to use as she might see fit in caring for C, must be construed as giving to the widow the five legacies as a trustee, and each upon separate trusts,' and that, if she declined either trust, the probate court could designate a successor to hold during her life, 'whose duty it would then be to apply the money for the help of the beneficiaries, as the widow should from time to time direct,' and that, if there was any failure by the trustee to exercise an honest discretion in favor of any beneficiary, such beneficiary could obtain relief in the probate court or in equity, and that 'the mode of help extended in all cases [rested] largely in the discretion of the trustee, subject to direction by the court.' It will be observed that the language, 'for her to help as she sees fit' is equally as indefinite and uncertain, as to the amount of assistance to be rendered, as the language, 'so much more of it as to her may seem proper to be allotted to the assistance of,' which is used in the will now under consideration. Assistance means 'aid' or 'help,' and if it be contended that the word 'assistance' is, in and of itself, an indefinite term, and one which cannot be rendered definite and certain, when applied to given circumstances, by a resort to evidence, the same contention could be applied to the word 'help,' used in the Connecticut case. In the opinion in that case, Baldwin, J., after discussing the legacy given to the widow 'for her to use as she may see fit in caring for' a named person, said: "The language of the other legacies, which provide for assistance to certain relatives of the widow, is less decisive of the testator's intention; but we are of opinion that by these, also, he designed to create a trust estate of the same nature, and has used words sufficient for the purpose. Each legacy is given to the widow "for her to help" the person designated as (not if) she may see fit. That he contemplated her giving such help to some extent is evident from the bequest of 'the remainder and residue' of the legacies upon her decease." He further said: 'It is to be presumed that these trusts will be wisely and fairly administered, but, should there be any failure to exercise an honest discretion in favor of the respective beneficiaries, they could obtain proper relief either from the probate court, or in an equitable action. *In re* Simon's Will, 55 Conn. 239, 243, 11 Atl. Rep. 36; Smith v. Wildman, 37 Conn. 384; 1 Jarman on Wills, 696.'

While it will beseen that in that case each of the particular legacies was bequeathed by the testator to his wife for her to help a designated person, and therefore it may be said that the sum given in trust was not itself indefinite and uncertain, yet it is evident that the amount to be applied from this sum from time to time by the widow, as trustee, to the help of the *cestui que trust*, was equally as indefinite and uncertain as the amount to be applied in the present case by Mrs. Jackson, from the remaining income of the estate to the assistance of the Princes. If in the case cited the court could undertake to determine whether the trustee under given circumstances, exercised a proper discretion in helping the beneficiaries, it would seem that a court of equity could, upon the application of the beneficiaries

designated in the testamentary provision now under consideration, determine whether Mrs. Jackson, under given circumstances, had exercised a proper discretion in reference to rendering assistance to them. And if in that case, upon the declination of the testator's widow to accept and execute the trust, the court, notwithstanding the fact that the manner and mode of its execution was left to her discretion by the testator, would not allow such declination to destroy the trust intended by him, why should a court of equity in this case allow Mrs. Jackson's declination to destroy the trust intended by her husband for his sister's children, merely because the amount of such assistance was to be, from time to time, determined by her discretion? The rule in cases of this character is that if the court is of opinion that a trust was intended by the testator, and such trust can by any possibility be executed by the court, the court will not allow the refusal of the person named or designated as trustee to destroy the trust intended. So we think that the ruling of the Connecticut case, that the declination of the person whose discretion was made by the testator the measure of the amount of help to be extended from time to time to the beneficiary, should not be allowed to defeat the trust, was eminently sound."

NOTES OF IMPORTANT DECISIONS.

MUNICIPAL CORPORATIONS—IS THE INTEREST ON MUNICIPAL BONDS A GOVERNMENTAL EXPENSE?—The question here stated arose recently in a peculiar manner in the case of Mayor of the City of Anniston v. Hurt. 37 So. Rep. 220. In that case petitioner, a judgment creditor against the city of Anniston, brought a proceeding by mandamus against the mayor of that city commanding them forthwith to set aside a sufficient amount of the surplus revenue of the city of Anniston to pay and satisfy the judgment recovered against said city by the petitioner's intestate, together with interest and costs, and order the same to be paid as of the time of the collection of said revenue, and that the mayor and city council of Anniston be prohibited from paying out any of the revenue of said city, for interest on bonds and accounts, until the judgment recovered by the petitioner's intestate, with interest and costs, were fully paid.

In granting the prayer of the petitioner the Supreme Court of Alabama held that in the absence of any authority in a city charter or other statute to make the interest on municipal bonds and accounts an item of expenditure for governmental purposes, the council may not, in making up the budget, estimate such interest as a governmental expense, and so, by anticipation, appropriate revenues to be collected to the payment thereof; thus defeating the right of creditors of the city to subject to their claims revenues in excess of the necessary current expenditures.

The court in its opinion makes the following argument: "The insistence of the petitioner is, that the expenditure of the item for interest on bonds and accounts, is not for a legitimate municipal purpose, and the money appropriated or appointed for that purpose in the budget of expenditures, constitutes, if collected, or will constitute, when collected, funds in the hands of the respondents in excess of the necessary expenses of administering the municipal government, and should be applied to the payment of his judgment. The charter, as we have said, requires of the city council before the 1st day of July in each year, to agree upon a budget of expenses for governmental purposes for the year ending the 30th of the following June, and the expenses to be itemized, such as salaries, streets, fire department, lights, schools, water, police, etc., the object of corporation expenditures.—and the estimated amount run out in figures for each. We have found, neither in the charter, nor in any other statute, any legislative authority to make the interest on municipal bonds and accounts, an item of expenditure for administration of governmental purposes. The council, therefore, had no right to estimate this interest as a governmental expense, and by way of anticipation in their budget of expenses, to appropriate the amount to the payment of interest on municipal bonds and accounts, so as to defeat the plaintiff or other creditors in their efforts to subject this excess over necessary current expenditures, to the satisfaction of their demands. The bond and holder of accounts against the city had no lien upon the revenues of the city, nor any claim thereon, superior to the judgment of the plaintiff, or the claims of any other creditor."

FRAUDULENT CONVEYANCES—UNDER WHAT CIRCUMSTANCES A CONVEYANCE IS FRAUDULENT AS TO SUBSEQUENT CREDITORS.—A case of importance on the question of conveyances, fraudulent as to subsequent creditors is that of Beasley v. Coggins, 37 So. Rep. 213, recently decided by the Supreme Court of Florida.

In that case, a bill was filed to set aside a fraudulent conveyance made by the defendant, alleging that such conveyance was a voluntary one to his wife, through an intermediary trustee and was in fact a gift, without any valuable consideration; that the bankrupt was largely indebted

and insolvent at the time of making such conveyance; that such bankrupt at the time of such conveyance was a merchant, and then intended an indefinite continuance of his mercantile business, and contemplated the creation of further indebtedness, and that said voluntary conveyance was contrived and executed of covin and collusion, for the purpose and intent that the subsequent creditors of the bankrupt should be delayed, defrauded, and defeated in the collection of their just claims. The court held that such a bill was not obnoxious to demurrer; and that the fact that such voluntary conveyance was recorded on the day after its execution did not impair the right of the trustee, as imparting notice to subsequent creditors, for, while such recordation is notice of the execution of the conveyance, it is not of itself notice of the secret and fraudulent purposes of the bankrupt in executing it; and such a conveyance, if fraudulent in fact, will be set aside in favor of the trustee.

The court's opinion in this case contains an interesting review of the authorities on this important question. We quote as follows:

In the case of Alston v. Rowles, 13 Fla. 118, the rights and status of subsequent creditors were referred to on page 136. Justice Westcott there says: "The doctrine of the Supreme Court of the United States, as announced in the leading case of Sexton v. Wheaton, 8 Wheat. 229, 5 L. Ed. 603, and as understood by Judge Story, is that a voluntary conveyance made by a person not indebted at the time, in favor of his wife, cannot be impeached by subsequent creditors upon the mere ground of its being voluntary. It must be shown to be fraudulent in fact, or to be made with a view to future debts." The opinion in this case (Sexton v. Wheaton) was written by Chief Justice Marshall, and learnedly discusses the proper construction and effect to be given the statute of 13 Eliz., dealing with fraudulent conveyances as regards creditors, and the statute of 27 Eliz., dealing with fraudulent conveyances as regards purchasers. These two statutes are substantially embraced in sections 1991, 1992, Rev. St. 1892. This case and the kindred one of Salmon v. Bennett, 1 Conn. 525, 7 Am. Dec. 237, are selected in 1 Am. Lead. Cas. 17, as the basis for very elaborate discussion and annotation. On page *40 it is said: "Against subsequent creditors, as is decided in Sexton v. Wheaton, a conveyance is not void unless actually fraudulent. But there is a little obscurity as to what are the frauds of which they might take advantage. If the fraud be directed specifically against subsequent creditors—that is, if a voluntary settlement be made with a view to becoming subsequently indebted, which may be inferred from the fact of debts being contracted immediately after—there is no doubt that the settlement may be avoided by subsequent creditors. But that is not the only sort of fraud that may be taken advantage of by subsequent creditors, for it is clear that if a conveyance be made colorably, with actual intent to defraud any existing creditor or creditors, it may be avoided by subsequent creditors: in other words, that evidence of collusion against existing creditors is sufficient evidence of fraud against subsequent creditors. Otherwise it would be easy to evade the statute. The party might pay off those to whom he is indebted at the time he is making the settlement, by borrowing of others, and then say to these last, 'I did not make the settlement to defraud you but to defraud the other persons who were my creditors.'" It is stated that the foregoing doctrine is probably limited to voluntary conveyances which are accompanied, in law, by the presumption of a secret trust for the grantor. It is further said on page *41: "An intent actually to defraud creditors is to be legally inferred from the grantor's being insolvent at the time, or greatly embarrassed, or so largely indebted that his conveyance necessarily has the effect to hinder and defraud creditors, * * *and a voluntary conveyance made under such circumstances may be set aside by a subsequent creditor." In some of the cases referred to in note 1, p. 41, we find that the registration laws have been regarded as settling the law to the extent that a subsequent creditor cannot complain of a voluntary deed of which he has constructive notice, except on the ground of actual fraud. Cook's Lessee v. Kell, 13 Md. 469; Kane v. Roberts, 40 Md. 590. In the last case the headnote states the law as follows: "A deed fraudulent and void as against the grantor's antecedent creditors is valid, if recorded, as against subsequent creditors, when there is nothing in the deed itself, and no evidence, to show any intent or design to defraud such creditors." In the case of Walker, Evans & Cogwell v. Bollman, 22 S. Car. 512, the court held that a subsequent creditor could not attack a prior voluntary deed, of which he had notice, on the ground that it was voluntary, but that he could do so on the ground that it was made with reference to future indebtedness, or other circumstances of fraud other than its being voluntary. Also, see Moore v. Blondheim, 19 Md. 172; Brundage v. Cheneworth, 101 Iowa, 256, 70 N. W. Rep. 211, 63 Am. St. Rep. 382; Jackson v. Plyler, 38 S. Car. 496, 17 S. E. Rep. 255, 37 Am. St. Rep. 782. See, also, the following annotated cases: Jenkins v. Clement, 14 Am. Dec. 706; Hagermann v. Buchanan, 14 Am. St. Rep. 751, 752, *et seq.*: Rudy v. Austin, 35 Am. St. Rep. 85 *et seq.* On page 752, 14 Am. St. Rep. *supra*, the annotator, discussing the effect of a conveyance as against subsequent creditors, says: "We apprehend that no general rule can be formulated equally applicable to all cases, and that such judicial declarations as have been made upon the subject must be interpreted with reference to the particular facts of the case in which they were made. If the subsequent debts were contracted long after the voluntary transfer was made, the presumption that it might have been

been made with a view of contracting them and of defrauding the subsequent creditors certainly becomes exceedingly weak, and may reasonably be treated as entirely destroyed, unless other circumstances appear to give it renewed vitality. The evidence may, on the other hand, disclose that the subsequent debts have merely taken the place of prior ones, or that the debtor has continued or embarked in a business in which his becoming indebted was inevitable, or there may be other circumstances of the like persuasive character, creating or strengthening the presumption that, as the transfer was in fraud of prior, it was also in fraud ofsubsequent, creditors." Bump on Fraudulent Conveyances (4th Ed.), § § 293-296. After a careful examination of many cases, this doctrine seems reasonable. We are unable to discover how constructive or even actual notice of the execution of a voluntary deed by a debtor could of itself inform a subsequent creditor of the secret purposes of the debtor in making the deed, of his insolvency, of his intention to contract large debts, or of his intention to engage in a hazardous enterprise, the risk of which he was seeking to avoid, or of other fraudulent and covinous purposes he might entertain, so as to shut off the subsequent creditors from attacking the voluntary deed for such or other sufficient causes. See Diggs v. Mc Cullough, 69 Md. 592, 16 Atl.Rep. 453; Scott v. Keane, 87 Md. 709, 40 Atl. Rep.1070, 42 L.R. A. 359; Baltimore High Grade Brick Co. v. Amos, 95 Md. 571, 52 Atl. Re 582, 53 Atl. Rep. 148. Our opinionis that, in so far as the instant case is concerned, where the bill is filed by a trustee in bankruptcy representing all classes of creditors, and where the facts are such as are here alleged, the bill is not obnoxious to the demurrer which was in terposed.

CHARGING THE DISTRIBUTIVE SHARES OF AN INTESTATE'S GRANDCHILDREN WITH A DEBT OWING TO THE INTESTATE BY THEIR PARENT WHO DIES IN THE LIFE-TIME OF THE INTESTATE.

Statutes have frequently been enacted to the effect that where a child of an intestate dies in the life-time of the latter, and leaves issue who survive the intestate, such issue shall inherit the share to which the deceased child would have been entitled if he himself had survived. Under these enactments the question has arisen whether the children of the predeceased child inherit directly from the intestate or do they take by representation through their immediate ancestor; and if the latter, are their distributive shares chargeable with the debts owing to the intestate by such immediate ancestor? Considering the probability that children of an intestate who have died in his lifetime may, in many instances, have been indebted to him at their death, and that their children would be the more likely to assert a claim against the intestate's estate by reason of their immediate ancestor's insolvency, it is surprising that so few decisions exist in the United States upon the exact question now under consideration. Its practical importance arises when the administrator attempts to retain out of the shares of the children of the predeceased debtor the amount which was owing to the intestate by their father. If they are to be deemed the direct heirs of the intestate, their proportionate parts cannot be thus diminished. If they stand in the place of their parent for all purposes, then the retainer is right; since the law is well settled that before an heir or a legatee is entitled to receive his distributive share or legacy from a decedent's estate, he must pay to the estate the debt which he owes.[1] This doctrine has been carried to the extent that even though the share thus retained is less than the legal exemption allowed by law to the distributee, he cannot recover it until he has paid his debt to the estate;[2] and the same rule applies where his debt to the intestate has been barred by the statute of limitations[3] or discharged in bankruptcy.[4]

Ought the same result be reached where the claimant against the estate is not a debtor who is the intestate's child, but a child of the debtor? Do the statutes, such as those above referred to, intend to transmit to the child of the predeceased debtor, the exact *quantum* of the estate of the intestate to which the debtor himself would ultimately have been entitled if he had survived the remote ancestor and had paid all that was owing by him to the intestate?

This inquiry may be answered by ascertaining the grounds upon which an administrator or executor is permitted to retain the debt owing to the estate by a distributee or legatee. It is sometimes based upon the doctrine of set-off,[5] but this is erroneous. The real

[1] Holmes v. McPheeters, Admr., 149 Ind. 587; 2 Williams on Exec., 7 Amer. Ed. 849-850.

[2] Fiscus v. Fiscus, 127 Ind. 283.

[3] Rogers v. Murdock, 45 Hun, 30; Tinkham v. Smith, 56 Vt. 187; Holmes v. McPheeters, 149 Ind. 587.

[4] Wilson v. Kelly, 16 S. Car. 217; Sartor v. Beatty, 25 S. Car. 293.

[5] Hughes' Appeal, 57 Pa. 179; 2 Williams on Exec., 7 Amer. Ed. 849.

explanation is two-fold; first, the law deems it inequitable that the distributee, who is himself a debtor, shall obtain further benefit from the decedent's estate, before he returns that which he has already received from the decedent; for otherwise he could secure two full shares, while his co-heirs would secure but one. Second, when the administrator, retains so much of the distributee's share as will satisfy the heir's debt, he is merely exercising his right to apply the assets of the estate to the payment of claims against it. One of these claims is held by the debtor as an heir; this debtor, presumably, still has in his hands funds of the estate which he has borrowed; consequently the administrator may appropriate these funds to the payment of the debtor's distributive share, upon the same principle that he might set off to a specific legatee, who has been given a United States bond by will, a federal bond which the legatee has unauthorizedly taken from the estate, subsequently to the testator's death. In the latter case, the legatee has a claim against the estate for a bond; but the estate has a similar claim against him; and when he asks for the satisfaction of his specific legacy, it is a sufficient answer to his request that he already has a bond in his possession corresponding to that which the will gave him; and this asset the executor now applies to the discharge of the bequest.[6]

Whether the doctrine of retainer rests upon equity and good conscience or upon the theory that funds remaining in the distributee's hands are abandoned to him by the administrator, it has no proper application to the heirs of a debtor who has predeceased the intestate creditor. It is not inequitable nor unconscionable for them to ask for a full distributive share of their remote ancestor's estate, for they have never realized anything from that estate, and hence cannot be charged with having received a double portion. Even though they may have inherited a substantial amount from the debtor (their immediate ancester), it would be difficult to trace the borrowed funds into such an inheritance. Nor can the administrator satisfy the claim of heirs against the estate by appropriating any funds of the estate which are in their hands; for not being themselves the borrowers, they have no funds belonging to the estate. Upon neither ground, therefore, does the doctrine of retainer prevail as against the heir of an immediate ancestor who, at his predecease, is indebted to the remote ancestor.

The principal argument against this conclusion is not so much that it operates to give to one class or group of heirs too large a proportion of the estate, but that it tends to bestow too little upon heirs who were not borrowers nor children of borrowers. The argument is, that if the debtor had lived, he would have received his share diminished by his debt to the estate; and his nonborrowing brothers and sisters would have been proportionately benefitted by such retainer. If now the children of such debtor are not subjected to the same reduction, their uncles and aunts will obtain less of their common ancestor's estate, merely through the accident of the debtor's decease in the lifetime of the intestate. But this view assumes that there is a natural right of inheritance, and is based upon the popular fallacy that children of a parent own his estate even before he dies. There is no natural right to inherit property, real or personal. If there be no disposition by will, the law of descents now directs how the proporty shall devolve; and according to the provisions of the statutes of distribution must be determined the rights and liabliities of heirs, remote and immediate.[7]

Do statutes, similar to those above indicated, cast the inheritance directly upon the debtor's heirs, or do the latter inherit simply as the debtor's representatives and subject to his burdens? It has been supposed sufficient to ascertain if the debtor's heirs take *per capita* or *per stirpes;* if the former, then it is said their inheritance is direct from the remote ancestor and they take free from their parent's debts; if they take according to the roots, they secure only so much property as their parent would have taken if he had lived, and subject to the same deductions which would have been valid against him.

Suppose it be granted that the heirs take *per stirpes*, and not *per capita*; does it follow that they receive their share burdened with the claims of the estate against their root of descent? It is submitted that the whole purpose of the statutory provisions above set forth

[6] Holmes v. McPheeters, 149 Ind. 587.

[7] Succession of Morgan, 23 La. Ann. 290; Stokes v. Stokes, 62 N. Car. 340, 40 S. E. Rep. 662.

is to determine the fractional share to which the respective heirs are entitled; but that in the absence of any act of the legislature requiring the debts of predeceased children to be charged against their issue, the latter take a full fractional share under the statute, regardless of what claims the estate held against their immediate ancestor. Thus, if the remote relative be A and he have two sons, B and C, and B die in the lifetime of A, leaving five children, and B be indebted to A at his death, the statute provides that upon the death of A his estate shall be divided, not into six parts, but into two, and the children of the predeceased child B take *per stirpes*; i. e., they receive one-half only of the estate, to be divided among the five. They do not take *per capita*, which would give them one-sixth each. The whole design of the statute is accomplished in bestowing upon C one-half of the estate and upon B's five children one-fifth of one-half, or one-tenth respectively. But this does not necessarily involve the further result that B's children take their five-tenths of the estate subject to their father's debt. They are substituted in his place, as representing him in the line of descent; they take by substitution and not by transmission through him. Thus it was early held in Pennsylvania.[8] that where a son of a decedent predeceased his father and left children, on the death of the decedent (who left children and grandchildren) a debt due from the predeceased son to his father could not be charged against the share of the grandchildren, even though they take *per stirpes* and not *per capita*. The court said: "The grandchildren of an intestate take by substitution, not through but paramount to their parent. The law designates them as persons to take a title derived, not from their parent, but immediately from the intestate."

The Supreme Court of Louisiana, in a decision rendered in 1871, under a similar state of facts, held that the inheritance of the heirs could not be diminished by the debt owing to the intestate by their father, saying: "A dead man can neither get nor give; he can neither inherit nor transmit. The representative of the deceased person does not receive by transmission from that person and *jure alieno* he receives by designation of law and *jure suo*. It follows, therefore, that the representative is not by the fact of representation merely, rendered personally liable for the debts of the person whom he represents. He is endowed by the law with the rights of the latter in a certain succession, but is not laden with the obligations of that latter to the rest of the world. He is not an accepting heir, but a designated representative."[9]

The same result was reached by the Massachusetts supreme court which declared: "We can have no doubt that in such a case the estate does not come by inheritance from the nearer ancestor, within the meaning of the law. The children (of the nearer ancestor) did not inherit any estate from her, because it never became hers. In determining who were the heirs of their grandmother (the remote ancestor) the statute made them entitled to take the share which their mother would have taken if she had lived, as representing her in the line of descent. but the inheritance was directly from the grandmother. The representation of their mother is only to fix the share which they shall inherit."[10]

As suggested by the above quotation, the nearer ancestor never received anything and hence could transmit nothing. As said by the court in Ilgenfritz's Appeal.[11]

"The property never was in the parent, consequently they (the heirs) did not inherit from him what he had not."

The Kentucky court of appeals thus announce the law: "The surviving issue take the estate devised, not as heirs-at-law or distributees of the deceased devisee, but as legatees directly and immediately under and by virtue of the will. They take 'as the devisee or legatee would have done if he had survived the testator;' the effect of which is to confer upon the surviving issue the same estate and interest under the will as if the devise or bequest had been directly to them instead of to their father. Such being the obvious effect and operation of the statutes, upon what principle can the debts against the ancestor of the appellants be regarded as a charge upon the legacy to which the latter are entitled as legatees? The legacy in contest certainly

[8] Ilgenfritz's Appeal, 5 Watts, 25 (1836).

[9] Succession of Morgan, 23 La. Ann. 290.

[10] Sedgwick v. Minot, 6 Allen, 171 (1863).

[11] Ilgenfritz's Appeal, 5 Watts, 25, 26.

never vested in the ancestor in his lifetime, and at his death he had no interest in the estate of his father, which devolved upon his children as his legal representatives. They claim now, not in his right, but in their own right. Upon the death of the testator the legacy vested immediately in them, and can no more be subjected to the debts of their father than any other estate which may have been acquired by them since his death from any other source."[12]

In a recent North Carolina decision involving the present question, the court remark: "The right of retainer on the part of the administrator is a mere equity, not arising under but is independent of the statute. The share which the deceased parent would have been entitled to, if he had survived the intestate, does not constitute part of the assets of his estate, and is not liable to the payment of his debts. There is no privity between the estate of the deceased parent and his children as to property descending to them under the statute from their intestate uncle."[13]

No stronger case, considering the terms of the particular statute involved, has been decided than that presented to the highest court of Maryland in which the decedent's act provided: "If a father or a mother be dead, the children of such father or mother shall receive the same share of the estate as the father or mother, if living, would have been entitled to and no more." The court said: "If Mrs. Mondell, (the predeceased relative) were living, she would take by inheritance the undivided half of the real estate of which her sister died seized and possessed. The nephews and nieces, (descendants of the predeceased relative) take 'no more.' Mrs. Mondell's share, one-half, would not be denied her if she were living. She would take it just as any other property, but it would be liable to her debts just like any other property. It would still be her property. If, instead of owing her sister, through whom she inherited, she had owed some other person, she would be in the same situation precisely in respect to this one undivided half, as she would be under the judgment to her sister. In either case, the share might be liable to her creditors' claim, but the full share one-half would go to her, and no more than this goes to the heirs, her children. Why the words, 'and no more' are found in the statute may occasion diverse opinions. The probability is that they are there out of an abundant caution; that is, to publish it distinctly and with emphasis, that the children of a deceased brother and sister take *per stirpes* and not *per capita*. The property in controversy belongs by inheritance from their aunt to the children of Mrs. Mondell. She herself never owned it or had any interest in it, and in no event can it be made liable for her debts."[14]

A further reason for denying liability on the part of the heirs is, that if the debt of the predeceased ancestor to the remote ancestor's estate can be charged against the distributee's share, then any other debts, owing by the immediate relative, should be collectible from the same source. As said in Ilgenfritz's Appeal: "If the administrators could come upon the fund in their hands as the representatives of the parent's creditor, it is obvious that all his other creditors might do the same—a consequence not to be pretended."[15]

Moreover, if the immediate ancestor had, during his lifetime, attempted to alien the expectant interest which he or his descendants would have in the remote ancestor's estate, such a transfer would not operate to cut off his descendants from claiming a share of the property. The statute gives them a right which the most solemn act of their nearer relative is powerless to destroy. Hence, it has been cogently argued, if the parent could not throw his children's share into one creditor's or transferee's hands, neither could another creditor (namely, the estate of the remote ancestor) claim the right to retain the share of the debtor in payment of the latter's debt as against the right of the debtor's children, who are under no moral or legal obligation to pay their father's debts; for this would more effectually bar the children than if their parent, the debtor, had in the lifetime of the original ancestor,

[12] Carson v. Carson's Exec., 1 Met. (Ky.) 300 (1858).
[13] Stokes v. Stokes, 62 N. Car. 346, 40 S. E. Rep. 662 (1902).
[14] Kendall v. Mondell, 67 Md. 444, 10 Atl. Rep. 240.
[15] Ilgenfritz's Appeal, 5 Watts, 25. But *cf.* Fletcher v. Wormingham, 24 Kan. 259.
[16] Stokes v. Stokes, 62 N. Car. 346, 40 S. E. Rep. 662.

executed a release of all interest in the estate.[16]

It by no means follows that the remote ancestor would wish that the heirs of the debtor should be chargeable with his debts, even though he desires to equalize the shares of his children where none have died in his lifetime, leaving issue. The heirs of predeceased children would often be minors, peculiarly the objects of the intestate's bounty. The fact that the latter has failed to collect his debt from his predeceased child may indicate the debt has been forgiven and that he does not wish it to be considered in the distribution of the estate. If the intestate had desired to charge the remote heirs with the debt of their immediate ancestor, it would have been easy for him so to do expressly by will, or he might have equalized the shares by absolute gifts to his surviving children during his life. If he avails himself of the statute of distributions and casts his estate directly upon near and remote kindred, the former have no ground for complaint, as the statute is but a will which the law executes for the intestate.[17]

It is significant that some of the states have enacted that where advancements have been made to children in the lifetime of the intestate, such advancements shall be charged against the child so receiving them and against his descendants. When such is the case, and no similar provision exists as to deduction of debts from the distributive shares of the descendants of debtors, the silence of the legislature is deemed a prohibition of such deduction upon the principle that *expressio unius est exclusio alterius*.[18]

The above conclusions are sustained by the weight of judicial opinion. There are a few decisions contrary; but these consist of brief and unsatisfactory discussions of the question and do not marshal the opposing authorities.[19]

Under statutes containing peculiar phraseology, it has been held that the deduction should be made. Thus, where the statute read that upon the death of a legatee, his descendants should take the legacy "with like effect as if (the original legatee) had survived the testator," the debts of a predeceased child were retained out of the grandchildren's shares,[20] and in Kansas the same result was reached where the statute provided that 'the heirs of such (predeceased) child inherit his estate in the same manner as though such child had outlived its parent."[21]

Yet it is a matter of serious doubt if even these statutory provisions intend to effect the rights of the heirs otherwise than in determining the fractional share of the whole estate to which they, respectively, are entitled as being in the line of descent, without determining the ultimate share which should be given to each.

HENRY M. DOWLING.

Indianapolis, Indiana.

[16] Powers v. Morrison, 88 Tex. 133, 28 L. R. A. 521 Barnum v. Barnum, 24 S. W. Rep. 780.

[17] Stokes v. Stokes, 62 N. Car. 346, 40 S. E. Rep. 662.

[18] Batton v. Allen, 5 N. J. Eq. 99, 43 Amer. Dec. 630; McConkey v. McConkey, 9 Watts (Pa.), 352 (based upon an earlier case of Ernest v. Ernest, 5 Rawle, 213, and a statute declaring the heir shall take by "representation." The decision was *per curiam*, with no discussion, and was of the length of ten lines. Followed in Hughes' Appeal, 57 Pa. 179 (1868).

[19] Estate of Robert Adams, 35 Pitts. Leg. Jour. 285 (Orphans' Court of Pittsburg).

[20] Fletcher v. Wormington, 24 Kan. 259; Head v. Spier, 71 Pac. Rep. 833 (Kan. 1903).

STREET RAILROADS—ILLEGAL SPEED.

McEWEN v. ATLANTA RY. & POWER CO.

Supreme Court of Georgia, August 12, 1904.

The estimates of the witnesses as to the rate of speed varied. Some placed it at 6 miles an hour, which was lawful; others, at more than 15 miles an hour, which was in excess of that alleged to be allowed by ordinance. There was no contradiction of the testimony that the plaintiff and two other passengers were jerked and hurled from their seats while the car was rounding a sharp curve. The physical facts were of more evidentiary value than the opinions of nonexperts. Under the circumstances, estimates that the speed was not improper were insufficient to overcome the presumption arising from the fact of the injury, and the verdict for the defendant was contrary to law.

Mrs. McEwen sued the Atlanta Railway & Power Company for injuries alleged to have been received by being thrown from her seat in a street car in consequence of the company's negligence in running at a high rate of speed around a sharp curve, throwing her and other passengers from their seats. The petition alleged that the motorman seemed to lose and did lose control of the car, and negligently allowed the car to run at "a very unusually high and dangerous rate of speed;" that it was running at the rate of 35 or 40 miles per hour, and, while running at this high and dangerous rate of speed, in the

negligent manner alleged, it reached a sharp curve, causing it to make a quick jerk or swing to the right, the force of which threw the plaintiff from her seat and across the aisle. By amendment the plaintiff struck the allegation that the motorman did lose control of the car, and alleged that the car was being run at a greater rate of speed than 15 miles an hour, in violation of the city ordinance, which limited the rate ot 10 miles within a quarter of a mile of the Union Depot, and not greater than 15 miles beyondthat distance. Most, if not all, of the passengers on the car were introduced as witnesses. The plaintiff testified that the car was going fast, but she did not know at what speed. Another witness testified that she did not know how fast it was going. The plaintiff's son testified that it was going unusually fast—fully 15 miles an hour, possibly more—and that the motorman seemed to have lost control. Another witness testified that the car was "going just about the speed of a common trot for a horse when driving;" another, that he did not know whether it was 25 or 30 miles an hour, or how fast. "It was going at a pretty rapid rate;" It was running at a higher rate of speed than usual." On cross-examination he said: "I don't know whether it was above the average rate or not." Another witness testified that the cause of the fall was "the swaying of the car as it went around the curve." He did not think there was anything unusual. Another said that the "car was going pretty lively, but didn't notice any excessive speed. A policeman testified: "I don't think it was running over 12 miles an hour—maybe not that fast quite." Another passenger testified: "I think [it was running] about 7 or 8 miles an hour. The track was slick. While I am not an expert as to speed, I say it was not going more than 6 or 7 miles an hour, at its highest speed." There was evidence that another lady was thrown from her seat, and on top of the plaintiff, and that another was thrown into the aisle. There was also testimony that a man standing on the front platform was thrown therefrom. This, however, was denied by other witnesses. There was evidence that, years before, the plaintiff, who was quite aged, had suffered from convulsions, and that she was similarly affected after the fall. There was also evidence that she appeared to be very feeble on the day she entered the car. The defendent offered no testimony. The verdict was for the defendant. The plaintiff made a motion for a new trial on the ground that the verdict was contrary to law and the evidence and because of the discovery of a witness who would testify that the car was running at the rate of 15 miles an hour or more. The court refused a new trial, holding that the newly discovered evidence was cumulative; also: "There is but one assignment of negligence in the petition, to wit, excessive speed. The proven fall and injury of the plaintiff raised a presumption of negligence against the defendant, which required of the vindication of its diligence, but only as to the negligence charged. The plaintiff, not resting on the presumption raised, went further, and put before the jury the evidence of practically all the passengers on the car—practically all the completely disinterested evidence that could be adduced on the trial. The defendant claimed that the evidence vindicated its diligence as to the negligence charged, and rested without the introduction of evidence. The jury decided that there was no negligence in the rate of speed, and the legal effect of their finding is that plaintiff's injury was due to accident or negligence not charged in the petition. The question involved was one of pure fact, and I do not feel that I can properly disturb the finding. The motion for new trial is therefore overruled." The plaintiff excepted.

LAMAR, J.: The public demands rapid transit, and passengers cannot recover for damages occasioned by the jolts and lurches inevitably caused by running around curves at a proper rate of speed. Augusta & Summerville R. Co. v. Renz, 55 Ga. 126; Macon R. Co. v. Moore, 99 Ga. 230, 25 S. E. Rep. 460; Ball v. Mabry, 91 Ga. 783, 18 S. E. Rep. 64; Crine v. Ry. Co., 84 Ga. 651, 657, 11 S. E. Rep. 555; Wynn v. City & Suburban Ry., 91 Ga. 357, 17 S. E. Rep. 649; Ayers v. Rochester Ry. Co., 156 N. Y. 104, 50 N. E. Rep. 960; Hite v. Metropolitan St. Ry. Co., 130 Mo. 132, 31 S. W. Rep. 262, 32 S. W. Rep. 33, 51 Am. St. Rep. 555; Wilder v. Metropolitan St. Ry. Co. (Sup.), 41 N. Y. Supp. 931, affirmed 161 N. Y. 665, 57 N. E. Rep. 1128; Reber v. Pittsburg Traction Co. (Pa.), 36 Atl. Rep. 245, 57 Am. St. Rep. 599. There was no proof of the ordinance, except that involved in the presumption of the negligence alleged, arising from the proof of injury. But for a street car to round a curve at a rate which threw three passenger from their seats into thea isle proclaims that, regardless of ordinance or estimates, the speed was at that point improper. Acts speak louder than words. The undisputed physical facts declare the speed to have been unsafe, in terms too certain to be disproved by the mere opinion evidence of nonexperts as to the rate at which the car was moving. Patton v. State, 117 Ga. 230, 43 S. E. Rep. 533. It is true that several of the witnesses said they did not "know how fast it was running;" others, that "it was not unusual," to hers "at a jog trot," another, "not more than 6 or 7 miles an hour;" others, "pretty lively," "very fast," and "unusually fast;" and others, 15 miles an hour—possibly more." If there were nothing except these contradictory estimates, a verdict finding that the car was running more than 15 miles an hour, or less than 6, could have been sustained. Or, if no one had fallen except the plaintiff, it might have been concluded that her injury had been due to a fall occasioned by her previous sickness, some sudden accession of weakness, or by some cause other than the negligence of the company. But when another passenger on the same seat and next to

the window, and still another in a different part of the car, were likewise throw into the aisle, there remains no room for doubt that the speed was improper and unsafe. Mere estimates are not sufficient to overcome the presumption arising from the injury. when coupled with the additional undisputed fact that two other persons were so jerked and hurled as to be thrown from their seats when the car ran around the sharp curve. A new trial should have been granted.

Judgment reversed. All the justices concurring, except Fish, P. J., and Chandler, J., who dissent.

NOTE.—*Evidence as to Rate of Speed of Street Railroad Cars.*—In an action for injuries due to a collision of electric street cars, the manner of running the cars, their speed, and the facility with which they can be stopped, are proper subjects of expert testimony. Howland v. Railway Company, 110 Cal. 513, 42 Pac. Rep. 983. So also the question as to the time or distance in which the car could have been stopped constitutes a subject for expert testimony. Hammerburg v. Metropolitan Street Railrway Co., 62 Mo. App. 563; O'Neill v. Railway Co., 59 N. Y. Super. Ct. 125, 15 N. Y. Supp. 84, 26 Am. St. Rep. 512.

But there are other ways of proving the speed of a street car. Thus in an action for injuries to a child run over by defendant's car, evidence that the car was run "faster than usual," that it was "going at full speed," and that "a man would have to run very fast to keep up with it," is sufficient to show that the speed exceeded 6 miles an hour and justify the admission in evidence of an ordinance restricting speed to six miles per hour. Baltimore City Pass. Ry. Co. v. McDonnell, 43 Md. 534. In an action for the death of plaintiff's intestate, who was run over by defendant's street car, a witness testified that just before the accident he signaled to stop the car, but the driver refused to do so, and urged on his horses, which were "going at a terrific rate." Another witness testified that he was on the front platform beside the driver; that the horses were going "at a very fast rate," in his opinion, "about 12 miles an hour;" that the driver did not notice decedent; and that he (witness) seized the reins to stop the car. The court held that this evidence is sufficient to charge defendant with negligence. Lang v. Houston, etc., R. R., 75 Hun, 151, 27 N. Y. Supp. 90, affirmed, 144 N. Y. 717, 39 N. E. Rep. 858.

In the case of Baumgardner v. Electric Street Railway Company, 7 Ohio N. P. 386, 5 Ohio S. & C. P. Dec. 159, the court held that evidence that a car was going "pretty fast" or "very fast" does not tend to prove that the car was being driven at an unlawful, negligent or dangerous rate of speed. The same rule was laid down in the case of Lebanon v. Railway Company, 167 Pa. 438, 31 Atl. Rep. 687, where the court held that the defendant street railway company cannot be held liable for damages caused by the scaring of plaintiff's horse by the defendant's electric car, on the ground that it was caused by excessive speed of the car on the testimony of plaintiff that the car was moving "fast," "pretty fast," "at full headway," and "swiftly," and of defendant's witnesses, that it was going at a moderate rate of speed, one of them saying that it was five miles an hour.

In an action against an electric street car company for the death of plaintiff's minor son, evidence that the car was running "some where between 11-96 miles and 17 miles per hour supports a finding that defendant was negligent in running the car at a greater rate than 12 miles an hour, to which it was limited by ordinance. Riley v. Rapid Transit Co., 10 Utah, 428, 37 Pac. Rep. 681.

The speed of a street car may also be proven by the distance it travels after striking the object which is subject of injury for which the suit is brought. Thus, where a car ran 40 feet after striking a carriage, and there was evidence that it could have been stopped in 5 feet if running at the normal rate of speed, the question of illegal speed goes to the jury. Degnan v. Brooklyn City Ry. Co., 14 Misc. Rep. 388, 35 N. Y. Supp. 1047. So also where the car ran 128 feet on a 2 1-2 foot down grade. Hedin v. Suburban Ry. Co., 26 Oreg. 155, 37 Pac. Rep. 540. So where a car runs 35 feet after striking a child at a grade crossing. Dunseath v. Traction Co., 161 Pa. 124, 28 Atl. Rep. 1021.

JETSAM AND FLOTSAM.

THE DANGER FROM SMALL-POX HOSPITALS.

One of the most difficult duties that a sanitary authority has to perform is to find a suitable site for placing a small-pox hospital. In choosing such a site they have many things to consider, not the least of which is the convenience of access to it, and with this they have to reconcile the further condition that it must not be in the vicinity of any dwelling houses. Wherever the hospital may be placed there is almost certain to be an outcry by the owners of property in the neighborhood, and the members of the authority may have to suffer a good deal of severe criticism in consequence. It is often impossible to find a highly suitable place for such a hospital, and sites have to be utilized which are not quite satisfactory for the simple reason that no better are to be had. Assuming that no site is available which is thoroughly isolated the question that has to be answered is whether or not it is safe to place a small-pox hospital in a more or less populous neighborhood.

This question has been raised in at least half a dozen cases within recent years, and up till now the decisions have been always in favor of the sanitary authority except when it has been proved that there was in fact a nuisance arising from the hospital. Most of the actions were what are called *quia timet* actions asking for an injunction not because a nuisance had in fact been caused, but on the ground that if the hospital was carried on there was practically certain to be a nuisance. There is no doubt that many people entertain a strong feeling against having such a hospital in their neighborhood, and this feeling has the effect of reducing the value of property in the vicinity of a hospital, which reduction is probably the cause why this question has been litigated so fully and so frequently in the courts. There has in consequence been a certain sameness about all these actions, although the probability of risk has varied owing to the position of the site and the number of persons living comparatively near to it.

The latest case is Attorney-General v. Mayor, etc., of Nottingham, 68 J. P. 125, decided in February 1904 by Farwell, J., after a trial lasting for several days. It is a good specimen of this class of action, and we understand it is likely to go to the house of lords, so that we may expect a final pronouncement on this question. Other cases where the same point has been raised are Fleet v. Managers of the Metropolitan Asylums District, 1 T. L. R. 80, and in the Court of Ap-

peal, 2 T. L. R. 361; Attorney-General v. Mayor, etc., of Manchester (1893), 2 Ch. 87, 57 J. P. 643; Attorney-General v. Guildford Joint Hospital Board, 12 T. L. R. 54, and Harrop v. Ossett Corporation, 14 T. L. R. 308. There has also been a recent case in Ireland—Attorney-General v. Rathmines, etc., Commissioners, which does not seem to have been reported.

These cases have laid down the general proposition that the court will not grant an injunction to restrain the use of premises as a small-pox hospital unless it is shown that the probability of danger is so great as almost to amount to a moral certainty. In Fleet v. Metropolitan Asylums Board, *supra*, where a hospital camp was in operation, and where the injunction was refused, Cotton, L. J., said that "the plaintiff must make out that there was real danger; otherwise, however much they might feel the hospital to be an annoyance, they could not get an injunction." Chitty, J., in the Manchester case, *supra*, in his judgment, also said when refusing an injunction: "The principle which may be properly and safely extracted from the *quia timet* authorities is that the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise." In the Rathmines case, FitzGibbon, L. J., stated it more strongly as follows: "To sustain the injunction the law requires proof by the plaintiffs of a well-founded apprehension of injury—proof of actual and real danger—a strong probability almost amounting to moral certainty that if the hospital be established it will be an actionable nuisance. A sentiment of danger and dislike, however natural and justified, certainty that the hospital will be disagreeable or inconvenient, proof that it will abridge a man's pleasure or make him anxious, the inability of the court to say that no danger will arise, none of these accompanied by depreciation of property will discharge the burden of proof which rests on the plaintiffs or justify a merely precautionary injunction restraining an owner's use of his own land upon the ground of apprehended nuisance to his neighbors." These remarks of FitzGibbon, L. J., were quoted with approval and adopted by Farwell, J., in the Nottingham case, *supra*. We have quoted these remarks in order to show what is the proposition of law which the various courts have applied to the facts. It is this proposition which, we presume, is to be questioned in the higher courts.

The actions have usually been brought in the name of the attorney-general, not *ex officio*, but on the relation of private persons residing or having property in the neighborhood of the hospital, and it has been sought to show that a small-pox hospital is a center from which the disease somehow or other is spread to an extent dangerous to public health for a distance of a half-mile radius. The evidence in support of this usually consists of that given by a number of eminent medical men as to what has occurred in the vicinity of other small-pox hospitals, and who give their opinion that the same is likely to happen in connection with the one in question. There is also an opinion expressed that small-pox is spread by what is called 'aerial convection," which appears to mean that something material is disseminated through the air from the patient and it is said to carry infection for nearly half a mile. As to this theory there is much conflict of opinion. The medical profession is divided upon it into two camps, both containing men of eminence and experience, and in the present state of our knowledge it is impossible for any independent person to form any true idea as to its correctness.

The evidence for the defense is usually directed to show that the existence of a small-pox hospital properly administered is not to be considered as being of itself a source of danger, and instances are cited of such hospitals having been conducted without having caused infection in their neighborhood. In the Nottingham case the hospital had been open and in use for six months without any cases of infection being traced to it. The experts for the defense usually consider that the hospital in question can be conducted in such a manner as not to prove a source of danger, and they dispute the theory of ærial convection to anything like the distance suggested by the rival experts.

We have referred to the Nottingham case as a fair specimen of this class of action, and may state now briefly the facts. The hospital in question was erected early in 1903 in the outskirts of Nottingham and is some miles from the most populous part, the access being by a road not very much frequented, and with only a few houses built along it. The hospital stands on a piece of ground four and a half acres in extent, roughly triangular in shape, the base of the triangle being about 350 yards long, and abutting on the high road, and the building is fifty-one feet from the road. There are 204 residents within a quarter of a mile radius from the building, and 510 within the half-mile radius. Besides these there were large works employing 230 men about a quarter of a mile off, and also a colliery within half a mile. There was one cottage only 48 yards distant, and six others 157 yards distant. It would appear, therefore, that if a small-pox hospital is necessarily a center of infection, this particular one was so situated as to be likely to cause the disease to spread. Farwell, J., however, did not think it was made out that the hospital could not be conducted in such a way as to prevent its being a nuisance, and refused the injunction.

There are two matters which seem to have weighed with the judges in all these actions. One is that a small-pox hospital is a far less evil than leaving the patients in their homes. The action is founded on the allegation that the hospital is dangerous to the public health, and yet the danger to the health of the inhabitants of a district, including those in the vicinity of the hospital, might be very vastly greater if the persons suffering from small-pox were not taken to such a hospital and there isolated and treated. Even a badly situated hospital is better for the health of the public than no hospital at all. The other matter is that vaccination is a far better preventative of small-pox than any injunction of the court. Vaccination and revaccination repeated at intervals confer practical immunity. If, therefore, a person seeks the interference of the court to prevent his being exposed to the risk of taking small-pox a question arises as to whether he ought not himself to take reasonable precautions to reduce that risk to a minimum. If he does so, the risk from a small-pox hospital is probably so slight as to be infinitesimal.

A question of evidence has also been raised in these cases, namely, as to whether evidence in chief can be given of what has occurred at other hospitals. Such evidence was admitted by consent before Farwell, J., in the Nottingham case, and it has also been admitted before other judges. At the same time it practically means the trying of each hospital, and causes the trial to last much longer than it otherwise would. Farwell, J., was of opinion that its admission was wrong in principle, as it raised a number of side issues on which it was impossible for the court to adjudicate without injury to absent parties, and, what

is more, without these being called to give their version of the facts. He hoped that h e might obtain some direction from a higher tribunal as to the admissibility of such evidence.

The course of this Nottingham case through the court of appeal and house of lords will no doubt be watched with great interest by all connected with sanitary matters. If the plaintiffs are successful, the result will probably be to close the majority of the small-pox hospitals in the United Kingdom. It will rarely be possible for a local authority to find a site of a mile's diameter devoid of population, and if that is necessary then the authority must go to the expense of promoting a bill or provisional order in parliament to acquire this large tract of country which they must then purchase and proceed to depopulate. This will no doubt take a year or two, and if an epidemic breaks out in the interval more harm is likely to be done in the district from the want of a hospital than was ever occasioned by its existence. However, it is a legal principle that the individual must not suffer for the benefit of the public.

INJURIES SUSTAINED IN FRIENDLY SCUFFLE.

On January 22, 1902, we called attention to the decision of the Supreme Court of Iowa in Lund v. Tyler, 88 N. W. Rep. 303, holding that in an action to recover damages for an assault the fact that plaintiff challenged defendant to a combat in which the injury was sustained, used insulting language, and by words and actions provoked the altercation, constituted no defense. We pointed out that such decision was sustained by the weight of authority, at the same time criticising its policy and contending that the law ought to be the other way. We said in part:

"If a man voluntarily enters into a fight, or intentionally provokes one, there is strong practical ground for invoking, not only the principle *volenti non fit injuria*, but the somewhat cognate one, that no one may profit by his own wrong. It might have a disastrous effect upon the public peace, as well as frequently result in abstract injustice, if it were generally realized that a person could be as insulting and pugnacious as he pleased and still recover a round sum for damages, if he were actually overborne in the fight or suffered himself to be injured. It is gravely questionable whether the provision allowing the conduct of the plaintiff to be shown in mitigation of damages is a sufficient corrective or safeguard."

What we maintain should be the rule when persons fight in earnest has recently been applied by the Kansas City Court of Appeals to the case of a fight entered into in a spirt of sport. Gibeline v. Smith (May, 1904), 80 S.W. Rep. 960. It was held that where two persons engage in a friendly scuffle, and one of them by accident injures the other, no action will lie.

It will be seen that the court distinguishes the case from those in which persons are drawn into and assaulted in the course of rough play without voluntarily participating in it. Bearing in mind this distinction, it would seem that the decision is sound in principle and practically proper and just. The court said in part: "It appears that defendant was a collector in Kansas City for a brewery, and that he drove around to the different saloons one or more times a week, to collect accounts arising from the sale of beer. Plaintiff kept a lunch counter in one of these saloons. He and defendant had been friends for near 9 years, and were in the habit, when meeting, of joking one another and scuffling together in a playful way. They were both large, robust men, and, though indulging in rough good humor and loud greetings when they met, no misunderstanding had ever arisen between them. On the day that plaintiff was injured, defendant had driven up to the saloon on his regular business, and when he met plaintiff they shook hands, the latter saying, 'How are you, "punceon"'? which the witnesses say is Italian for 'big belly.' They then began to push each other and scuffle until defendant pushed or threw plaintiff against a showcase. No unfriendliness resulted, and they took one or more drinks together at the bar, and defendant went on his way. It turned out that plaintiff was hurt by having two of his ribs broken, and, perhaps, receiving other injuries. The verdict being for defendant, we have stated as facts what the evidence in his behalf tended to prove. Afterwards plaintiff brought this action, wherein he charges that 'the defendant rudely, unlawfully, violently, forcibly, willfully, and in a rude and insolent manner, and without any cause, assaulted and beat the plaintiff,' whereby he was greatly injured, etc.

It is our opinion that if the parties to this controversy each voluntarily engaged in a friendly scuffle, and the defendant, without intending so to do, accidentally hurt the plaintiff, no action will lie. The mutual and lawful character of the act of the parties prevents liability attaching for an accident which may result to either. We do not say that a lawful act resulting in unintentional injury necessarily excuses the party committing it. But if the act is lawful, and is invited and participated in by another, and an injury unintentionally results, no liability arises. To hold otherwise would be to say that all untoward results from the play of men or boys in which they mutually engage would furnish a cause for an action by the injured party. Play, even though rough or dangerous, if mutually engaged in, is not unlawful, otherwise athletic games, now and always common to the people, would not have had the sanction which ages have given them.

Plaintiff, in aid of his position, cites us to the cases of Markley v. Whitman, 95 Mich. 326, 54 N. W. Rep. 763, 20 L. R. A. 55, 35 Am. St. Rep. 558, and Ricker v. Freeman, 50 N. H. 420, 9 Am. Rep. 267. Neither of them furnish him any support. In the former, a schoolboy walking along a street was made the victim of what was known as a 'rush game.' Other students coming up behind him pushed, each, the boy in advance until the one immediately behind the victim gave him a violent push between the shoulders, whereby serious injury resulted. An action was sustained, but it was put upon the ground that the injured boy was not a participant. In the latter case a schoolboy caught another by the arm and swung him rapidly around several times, then, letting him go suddenly, he shot off at a tangent, running against another boy, who instantly pushed him off, whence he was thrown against a coat hook fastened to the wall of the school building, the hook running into his neck and causing him injury of a serious character. The boy who swung him around was held liable; but in that case also the injured party was set upon without his consent, and he had no participation in the act."

If one of the participants in a friendly scuffle gives way to anger and exceeds all reasonable limits of force to be used under the circumstances, a different question would arise, and liability would probably follow. That, again, is a different question from the one raised by a voluntary fight in earnest where both parties contemplate extreme force and the exchange of serious injuries.—*New York Law Journal.*

HUMOR OF THE LAW.

Lawyer—I have my opinion of you.

Citizen—Well, keep it. The last opinion I got from you cost me $150.

Away on a bend of the Upper Missouri twenty-eight lawyers practiced the Iowa Code. It so happened that supplies were short at Fort Randall and a government team came over the prairie for coffee and corn. There were some old scores unsettled in the town, and the creditor resolved to get "secured." The leader of the bar looked it up in the Code, and filled out attachment blanks, in which it was sworn that "he had reason to believe, and did believe, the said United States were about to leave the country to defraud their creditors."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

ALABAMA....4, 59, 141
ARKANSAS....87, 159
CALIFORNIA....70, 83, 140, 151
COLORADO....92, 105
GEORGIA....31, 86, 39, 62, 104, 130
IDAHO....55, 68, 138
ILLINOIS, 2, 5, 12, 15, 20, 24, 28, 35, 46, 58, 63, 65, 79, 85, 86, 98, 103, 108, 111, 114, 121, 122, 132, 133, 135, 152, 157, 171, 174, 180, 181, 184, 189
INDIANA, 7, 11, 13, 26, 50, 53, 54, 80, 89, 117, 118, 119, 125, 139, 156, 158, 165
IOWA....1, 34, 190
KENTUCKY....78, 77, 96, 110, 134, 191, 192
LOUISIANA....143, 147, 150, 155, 160, 164, 187
MAINE....75, 101, 120, 169, 175, 176
MICHIGAN....30, 57, 74
MISSISSIPPI, 9, 14, 32, 61, 69, 91, 102, 115, 116, 127, 131, 149, 166, 177, 185
MISSOURI....33, 43, 48, 95, 123, 126, 146, 178, 179
MONTANA....8, 52
NEBRASKA....25, 27, 47, 64, 90, 93, 153, 161, 168
NEVADA....100
NEW HAMPSHIRE....19
NEW JERSEY....4, 56, 87, 97, 112, 172
NEW YORK....22, 82, 113, 167
NORTH CAROLINA....6, 21, 23, 29, 94, 99, 129, 136, 148
PENNSYLVANIA....84, 187, 183
RHODE ISLAND....162
SOUTH CAROLINA....18, 128, 144, 188
TENNESSEE....40, 72, 76, 170
TEXAS....10, 51, 64, 67, 71, 81, 106, 107, 124, 145, 173
UNITED STATES S. C....16, 38, 42, 44, 49, 142, 163
VERMONT....154
WASHINGTON....41
WEST VIRGINIA....109, 182
WISCONSIN....45, 60, 78, 88, 186

1. ABDUCTION—Forcible Defilement.—Under statute against forcible defilement, the taking must be unlawful and against the woman's will, and indictment must so allege.—State v. Hromadko, Iowa, 99 N. W. Rep. 560.

2. ACKNOWLEDGMENT — Where Notary Public is an Interested Party.—An acknowledgment of a trust deed containing a release of homestead before a notary who is a stockholder and director in the beneficiary is void.—Fugman v. Jiri Washington Building & Loan Assn., Ill., 70 N. E. Rep. 644.

3. ACTION—Contract or Tort.—Counts in a complaint in an action *ex contractu*, alleging negligence, merely descriptive of the mode in which the contract was broken, held not to render the complaint objectionable as joining an action *ex delicto* with an action *ex contractu* —Western Union Tel. Co. v. Crumpton, Ala., 36 So. Rep. 517.

4. ACTION—Mortgage. — Where mortgaged land was conveyed without covenants of title, a suit to foreclose a purchase money mortgage could not be paid pending an action by the state to recover a part of the mortgaged property under an alleged outstanding title.—Cook v. Weigley, N. J., 57 Atl. Rep. 805.

5. ADJOINING LANDOWNERS—Falling of Wall.—Owner of premises adjoining those on which a burned building stood, and who had called attention of the owner of the building to the fact that a wall was liable to fall, held not guilty of contributory negligence.—Beidler v. King, Ill., 70 N. E. Rep. 763.

6. APPEAL AND ERROR—Bill of Exceptions.—An exception that "the court erred in its charge" is too broad to be considered.—Sigman v. Southern Ry. Co., N. Car., 74 S. E. Rep. 420.

7. APPEAL AND ERROR—Evidence as Aid to Pleading.—Overruling demurrer to insufficent paragraph of complaint held reversible error.—Case v. Hursh, Ind., 70 N. E. Rep. 818.

8. APPEAL AND ERROR— Failure of Record to Show Disposition of Demurrer.—Where the record fails to show whether demurrer to complaint was overruled or withdrawn, the failure to sustain it cannot be reviewed. —Hefferlin v. Karlman, Mont., 76 Pac. Rep. 757.

9. APPEAL AND ERROR—Filing of Transcript of Record —Where transcript of record was not filed for more than two years after decree, and no citation was served on appellee, the appeal will be dismissed.—Chambliss v. Wood, Miss., 36 So. Rep. 246.

10. APPEAL AND ERROR—Objection to Testimony.—Any error in admitting testimony held cured by the admission without objection of testimony of another to the same effect.—Southern Kansas Ry. Co. of Texas v. Sage, Tex., 80 S. W. Rep. 1038.

11. APPEAL AND ERROR—Violation of Town Ordinance —Where the lower court had no jurisdiction of an action under a town ordinance, the court on appeal had no power to determine the validity of the ordinance.—Chicago, I. & L. Ry. Co. v. Town of Salem, Ind., 70 N. E. Rep. 530.

12. APPEARANCE—Public Improvements.—An objection to a judgment confirming a special assessment, challenging the court's jurisdiction over the subject-matter, is not waived by a general appearance.—Chicago Union Traction Co. v. City of Chicago, Ill., 70 N. E. Rep. 659.

13. APPEAL AND ERROR—Failure of Appellee to Act.—Where, for ten months after the filing of appellant's brief, no steps are taken by appellee, the judgment will be reversed.—Moore v. Zumbrum, Ind., 70 N. E. Rep 800.

14. ATTORNEY AND CLIENT—Contract for Services.—Where a client enters into a general contract with firm of attorneys, and one of them dies, the client may discharge the survivor and settle for services previously rendered.—Clifton v. Clark, Hood & Co., Miss., 36 So. Rep. 251.

15. BANKRUPTCY—Assignment of Future Earnings.—Under Bankr. Act, ch. 541, § 67d, assignment of future earnings held not superseded by discharge in bankruptcy of the assignor.—Mallin v. Wenham, Ill., 70 N. E. Rep. 564.

16. BANKRUPTCY—Title of Trustee Under Conditional Sale.—A trustee in bankruptcy held not a subsequent purchaser, pledgee, or mortgagee in good faith, within Laws N. Y. 1897, ch. 418, § 112, avoiding conditional sales as against such persons, under certain circumstances. —Hewit v. Berlin Mach. Works, U. S. S. C., 24 Sup. Ct. Rep. 690.

17. BANKS AND BANKING—Debts Due Public.—Deposits of county funds by county treasurer in unincorporated bank held debts due the public, and payable in full on death and insolvency of banker, under Code 1902, § 2538.—Lockwood v. Lockwood, S. Car., 47 S. E. Rep. 441.

18. BIGAMY—Evidence.—In a prosecution for bigamy in which defendant had testified that he drove his first wife away, his reasons for so doing were not admissible.—State v. Goulden, N. Car., 47 S. E. Rep. 450.

19. BILLS AND NOTES—Bona Fide Holder.—Indorsee's lack of knowledge of makers and indorser of notes held not to affect the *bona fide* character of his holding.—Hallock v. Young, N. H., 57 Atl. Rep. 286.

20. BILLS AND NOTES — Chattel Mortgage.—The fact that a note secured by chattel mortgage does not state upon its face that it is so secured does not render it void as between the parties, if possession of the mortgaged property is taken before the lien of a third party attaches.—Springer v. Lipsis, Ill., 70 N. E. Rep. 641.

21. BILLS AND NOTES—Release of Dower a Consideration.—Release of dower by wife held valuable consideration for note executed by her husband to her.—Trust Co. v. Benbow, N. Car., 47 S. E. Rep. 485.

22. BENEFIT SOCIETIES — Accord and Satisfaction.—Indorsement on surrender certificate of life insurance policy that it was given for a certain amount only held not to affect the effect of the certificate.—Simons v. Supreme Council A. L. H., N. Y., 70 N. E. Rep. 776.

23. BENEFIT SOCIETIES — Changing Constitution.—A beneficiary association held not entitled to change its constitution, to the detriment of an existing contract with a member, except by consent.—Johnson v. Grand Fountain of United Order of True Reformers, N. Car., 47 S. E. Rep. 463.

24. BENEFIT SOCIETIES—Murder of Insured by Beneficiary.—Public policy does not prevent the recovery of the amount of a benefit certificat by the heirs of the insured, who has been murdered by the beneficiary.—Supreme Lodge Knights and Ladies of Honor v. Menkhausen, Ill., 70 N. E. Rep. 567.

25. BONDS—Service on Parties in Action on Joint Bond.—The obligors on a joint bond should be joined in an action thereon, and on the return "Not found" as to any one of them, the plaintiff may proceed as to those duly served.—Young v. Joseph Bros. & Davidson, Neb., 99 N. W. Rep. 522.

26. BOUNDARIES—Rights of Foreclosure Purchaser.—The question whether a foreclosure purchaser takes land formed by accretion depends on whether a surveyor's line, inserted in the description in the mortgage, was the meander line of the river or an independent boundary.—Leonard v. Wood, Ind., 70 N. E. Rep. 827.

27. BROKERS—Parol Modification of Contract.—A contract created by letters may be changed by parol agreement as to those provisions not required to be in writing.—David Bradley v. Bower, Neb., 99 N. W. Rep. 490.

28. CANCELLATION OF INSTRUMENTS — Inadequacy of Consideration.—Mere inadequacy of consideration is not ground for relief to claimants under an outstanding unrecorded title, seeking to set aside a deed by their grantor of record to a subsequent purchaser.—Booker v. Booker, Ill., 70 N. E. Rep. 709.

29. CARRIERS—Death of Owner of Mileage Book.—A mileage book, at the death of the one to whom it is issued, goes to her personal representatives, and cannot be used by her husband to transport her remains.—Minish v. Southern Ry. Co., N. Car., 47 S. E. Rep. 432.

30. CARRIERS—Jumping from Car Where Danger is Imminent.—A passenger on a street car, who jumps therefrom under the danger and excitement incident to an imminent collision, is not guilty of contributory negligence.—Howell v. Lansing City Electric Ry. Co., Mich., 99 N. W. Rep. 406.

31. CARRIERS—Lost Ticket.—A carrier is not required to carry a passenger who has lost his ticket.—Harp v. Southern Ry. Co., Ga., 47 S. E. Rep. 206.

32. CARRIERS—Ejecting Prospective Passenger from Freight Train.—One boarding a freight train held not a passenger under any implied contract.—Alabama & V. Ry. Co. v. Livingston, Miss., 36 So. Rep. 256.

33. CHATTEL MORTGAGES — Bona Fide Indorser. — A *bona fide* indorsee of notes is not affected by an oral agreement with the payee that the deed of trust of chattels securing them should be subject to other incumbrances.—Long v. Gorman, Mo., 79 S. W. Rep. 180.

34. CHATTEL MORTGAGES — Priority of Claims.—Claim of chattel mortgagee will not be sustained, as against subsequent mortgagee, on the ground that he was a creditor and took possession before notice of the subsequent mortgage.—Sheets v. Poff, Iowa, 99 N. W. Rep. 573.

35. CHATTEL MORTGAGES—Validity as Against Subsequent Lienors.—If a mortgagee of chattels takes possession of the property before any other right or lien attaches, his title under the mortgage is good against everybody, although the mortgage was neither acknowledged nor recorded.—Springer v. Lipsis, Ill., 70 N. E. Rep. 641.

36. CONSTITUTIONAL LAW — Carriers' Tracing Act.—Civ. Code 1895, §§ 2317, 2318, known as the "tracing act," applies only to initial and connecting carriers doing business within the state, and is not a discrimination against such carriers.—Southern Ry. Co. v. Ragsdale Harper & Weathers, Ga., 47 S. E. Rep. 179.

37. CONSTITUTIONAL LAW — Changing Municipal Corporation Boundaries.—Acts 1903, p. 148, providing for the change of boundaries of municipal corporations, held not unconstitutional as authorizing the taking of private property without due process of law.—City of Little Rock v. Town of North Little Rock, Ark., 79 S. W. Rep. 785.

38. CONSTITUTIONAL LAW—Conflict of Laws as to Limitations of Actions.—A new limitation, prescribed by Code Civ. Proc. Mont. § 554, for the enforcement of a liability for corporate debts against directors of a corporation which has failed to make its annual report, held not unconstitutional as applied to actions outside of the state on a liability incurred prior to the enactment.—Davis v. Mills, U. S. S. C., 24 Sup. Ct. Rep. 692.

39. CONSTITUTIONAL LAW — Directing Verdict. — The authority given by statute to direct a verdict does not deprive a party of his property without due process of law.—Tilley v. Cox, Ga., 47 S. E. Rep. 219.

40. CONSTITUTIONAL LAW—Fire Insurance.—Acts 1901, p. 248, ch. 141, §§ 1, 2, declaring penalties for refusal of an insurance company in bad faith to promptly pay a loss, and for the bringing of a suit in bad faith by a policy holder, held not repugnant to the equality clause of Const. U. S. Amend. 14.—Continental Fire Ins. Co. v. Whitaker & Dillard, Tenn., 79 S. W. Rep. 119.

41. CONSTITUTIONAL LAW — Governor's Calling Extra Session of Legislature.—Under Const. art. 3, § 7, declaring that the governor may, on extraordinary occasions, convene the legislature by proclamation, it is his exclusive province to determine whether an occasion for an extra session exists.—State v. Fair, Wash., 76 Pac. Rep. 731.

42. CONSTITUTIONAL LAW—Impairment of Contract.—Change of law respecting redemption from foreclosure sale held not to impair any contract right of an independent purchaser at the sale.—Hooker v. Burr, U. S. S. C., 24 Sup. Ct. Rep. 706.

43. CONSTITUTIONAL LAW—Levy of Special Assessment for Street Improvement.—Due process of law in the levy of special assessments does not require notice to property owners respecting such matters as the legislature are self determined or delegates to the municipal authorities.—Meier v. City of St. Louis, Mo., 79 S. W. Rep. 90.

44. CONSTITUTIONAL LAW—Ordinance Against Dairies and Cow Stables.—Neither due process of law nor equal protection of the laws is denied by municipal ordinance, adopted under legislative authority prohibiting maintenance of a dairy stable, within the city limits without permission from the assembly.—Fischer v. City of St. Louis, U. S. S. C., 24 Sup. Ct. Rep. 673.

45. CONSTITUTIONAL LAW—Peddler's Licenses.—Rev. St. 1898, § 1570 *et seq.*, as amended by Laws 1901, p. 477, ch. 341, relative to peddlers' licenses, and exempting certain persons therefrom, held to violate Const. Wis., art. 1, § 1, and article 8, § 1, Const. U. S. Amend. 14, § 1.—State v. Whitcom, Wis., 99 N. W. Rep. 466.

46. CONSTITUTIONAL LAW—Right to Order an Examination.—A party held estopped from asserting that an order granted under Hurd's Rev. St. 1901, ch. 51, § 9, authorizes unreasonable searches and seizures, in violation of Const. U. S. Amend. 4, and Const. Ill. art. 2, § 6.—Sweedish-American Telephone Co. v. Fidelity & Casualty Co., Ill., 70 N. E. Rep. 768.

47. CONSTITUTIONAL LAW—Seizure of Property under Game Law.—Comp. St. 1901, ch. 31, art. 3, § 3, providing that all guns, ammunition and dogs, etc., in actual use in the state by any person while hunting without a license, shall be seized and sold, is unlawful, in that it provides for forfeiture and transfer of title of property without a hearing.—McConnell v. McKillip, Neb., 99 N. W. Rep. 505.

48. CONSTITUTIONAL LAW—Tokens in Payment of Wages.—Rev. St. 1899, §§ 8142-8144, prohibiting the issuance of tokens not redeemable in lawful money of the United States in payment for wages, held unconstitutional as impairing the right of contract.—State v. Missouri Tie & Timber Co., Mo., 80 S. W. Rep. 933.

49. CONSTITUTIONAL LAW—State Local Option Laws. —Equal protection of the laws held not denied by state local option law, under which the traffic in intoxicating liquors may be made a crime in certain territory and permitted elsewhere.—State of Ohio v. Dollison, U. S. S. C., 24 Sup. Ct. Rep. 703.

50. CONTRACTS—Acceptance for Benefit of Minor.—Acceptance of a contract made by a third person for the benefit of a minor is presumed from its beneficial character.—Johnson v. Staley, Ind., 70 N. E. Rep. 541.

51. CONTRACTS—Attorney's Fees.—A contract to pay attorneys for unknown heirs a sum in addition to the amount allowed for their fees, in consideration of their abandonment of an appeal to review such allowance, held contrary to public policy.—Steger v. Hume, Tex., 79 S. W. Rep. 19.

52. CONTRACTS—Building and Loan Associations.—Where the contract between a borrowing member and a building association has been completed, and the member has withdrawn, it is immaterial whether the contract was one which the association had the power to make.—Floyd-Jones v. Anderson, Mont., 76 Pac. Rep. 751.

53. CONTRACTS—Presumption Raised by Pleadings.—Where a contract counted on in a pleading is not alleged to have been in writing, it will be presumed to have been in parol.—Bell v. Bitner, Ind., 70 N. E. Rep. 549.

54. CONTRACTS—Restraint of Competition.—An agreement by a common carrier not to furnish sidings to stone quarries near its line is against public policy and void.—Chicago, I. & L. Ry. Co. v. Southern Indiana Ry. Co., Ind., 70 N. E. Rep. 843.

55. CORONERS—Effect of Findings of Coroner's Jury.—Under the common law a finding of a coroner's jury is equivalent to the finding of a grand jury.—*In re* Sly, Idaho, 76 Pac. Rep. 766.

56. COPORATIONS—Directors Acts Ratified by Stockholders.—Where stockholders, at a meeting legally called, ratified directors' acts in executing and delivering a mortgage to secure certain bonds, a minority stockholder was not entitled to enjoin the carrying out of the project.—McAlpin v. Universal Tobacco Co., N. J., 57 Atl. Rep. 802.

57. CORPORATIONS—Holding Real Estate.—Const. art. 15, § 12, relating to corporations holding real estate, held enforceable only at the instance of the public.—Pere Marquette R. Co. v. Graham, Mich., 99 N. W. Rep 408.

58. COUNTIES—Incurring Indebtedness for Court House Repairs.—A judgment in an action on a contract for repairing a county court house held not to be reversed, because void county orders given in payment were not surrendered.—Coles County v. Goehring, Ill., 70 N. E. 10.

59. COURTS—Removal of Administration Proceedings —Administration begun in the probate court of a county in which deceased was an inhabitant cannot be removed into a court of equity in any other district than that containing the county where the administration was begun —Patton v. Monroe, Ala., 36 So. Rep. 512.

60. CRIMINAL EVIDENCE —Expert Testimony. —Expert witness held qualified to testify as to the cause of a fracture of the skull, though he had never treated fracture of the skull.—Bowers v. State, Wis., 99 N. W. Rep. 447.

61. CRIMINAL EVIDENCE—Poisoning.—On a prosecution for murder by poisoning, testimony of a witness as to deceased's statement as to the circumstances under which her sufferings commenced held incompetent.—Boyd v. State, Miss., 36 So. Rep. 525.

62. CRIMINAL EVIDENCE—Proof of Venue.—Evidence that accused committed the crime in W, without showing the county, or that W is in Georgia, was not sufficient proof of venue.—Wooten v. State, Ga., 47 S. E. Rep. 193.

63. CRIMINAL LAW—Embezzlement.—Under the statute making all persons engaged in commission of a crime principals, where defendants co-operated together in embezzlement, it was immaterial which one received money from bailor.—McCracken v. People, Ill., 70 N. E. Rep. 749.

64. CRIMINAL TRIAL—Appeal from Justice Courts.—Where a justice refused to file a second appeal bond in a prosecution for breach of the peace, it was defendant's duty to resort to the appellate court to compel the filing thereof.—Guenzel v. State, Tex., 80 S. W. Rep. 371.

65. CRIMINAL TRIAL—Indeterminate Sentence.—It is not necessary, to support a sentence to the penitentiary for an indeterminate period, that the verdict should find the defendant's age.—Herder v. People, Ill., 70 N. E. Rep. 674.

66. CRIMINAL TRIAL — Instructions. — Where there were three counts in an information, and the state elected to rely on one, an instruction fairly setting forth the facts charged in the information held not erroneous. —Gould v. State, Neb., 99 N. W. Rep. 541.

67. CRIMINAL TRIAL—Place of Crime.—Defendant, in a prosecution for aggravated assault, cannot be convicted, where it appears that the alleged offense did not occur in the county charged in the information.—Stripling v. State, Tex., 80 S. W. Rep. 376.

68. CRIMINAL TRIAL—Preliminary Examination.—The failure of the state to produce all its attainable evidence on a preliminary examination is not ground for the release of a defendant held to answer.—*In re* Sly, Idaho, 76 Pac. Rep. 766.

69. CRIMINAL TRIAL—Reasonable Doubt.—On a prosecution for murder, an instruction that, if the "minds and consciences of the jury are fully satisfied" of the existence of certain facts, they should convict, is erroneous.—Jones v. State, Miss., 36 So. Rep. 243.

70. CRIMINAL TRIAL—Rule as to Requested Instructions.—A rule of court that requested instructions must be submitted before argument should be adhered to, if no essential point has been omitted in the instructions given.—People v. Lang, Cal., 76 Pac. Rep. 232.

71. CRIMINVL TRIAL—Severance of Defendants Jointly Indicted.—Right of severance of joint defendants in criminal prosecution is defeated, where the one whose prior trial is demanded has forfeited his bail.—Evans v State, Tex., 79 S .W. Rep. 374.

72. CUSTOMS AND USAGES—Damage for Delay in Shipping.—One shipping goods to agent at place where there is general uniform custom of suspending business on the Fourth of July held charged with constructive knowledge of such custom.—Pennsylvania R. Co. v Naive., Tenn, 79 S. W. Rep. 124.

73. DAMAGES—Breach of Agreement to Lend Money.—The breach of an agreement to lend money furnishes no grounds for a recovery of damage for injury to the reputation of the borrower from not getting it.—W. H. Carsey & Co. v. Farmer & Davis, Ky., 79 S. W. Rep. 245.

74. DAMAGES—Expectancy of Life.—In action for permanent personal injuries, prospective damages, based on expectancy of life at the time of trial, may be assessed.—Howell v. Lansing City Electric Ry. Co., Mich., 99 N. W. Rep. 406.

75. DAMAGES—Liquidated Damages.—Where a party binds himself in a certain sum not to carry on a particular kind of business within a certain territory, the sum mentioned is liquidated damages.—Augusta Steam Laundry Co. v. Debow, Me., 57 Atl. Rep. 845.

76. DEATH — Punitive Damages.—Instruction making assessment of punitive damages for wanton negligence compulsory, and not discretionary, held error.—Louisville & N. R. Co. v. Satterwhite, Tenn., 79 S. W. Rep. 106.

77. DEEDS — Contingent Remainders.—Deed in trust for grantor's wife for life, and at her death for her children, held to pass title, so as to render subsequent deed by the same grantor ineffectual. — Smith's Admr. v. Smith, Ky., 79 S. W. Rep. 223.

78. DESCENT AND DISTRIBUTION—Beneficiaries of Deceased Partner. — Beneficiaries of a deceased partner held entitled to sue to enforce their rights as against the administrator and persons adversely interested.—Rowell v. Rowell, Wis., 99 N. W. Rep. 473.

79. DESCENT AND DISTRIBUTION — Resulting Trusts.—The interest of a beneficiary in a constructive trust in lands descends to his heirs, who are entitled to a decree conveying title to them.—Shackleford v. Elliott, Ill., 70 N. E. Rep. 745.

80. DIVORCE—Recrimination. — A wife, guilty of adultery, cannot obtain a divorce on the ground of abandonment by the husband.—Eikenbury v. Burns, Ind., 70 N. E. Rep. 837.

81. DIVORCE—Residence.—After a husband had abandoned his wife, for which she demanded a divorce, her residence could not be regarded as the residence of her husband, but depended on the place where she actually resided.—Michael v. Michael, Tex., 79 S. W. Rep. 74.

82. DOWER—Service by Publication. — Where there are no tenants or occupants of the real estate, and persons claiming thereto are nonresidents, action for dower may be commenced by publication of summons. —Wetyen v. Fick, N. Y., 70 N. E. Rep. 497.

83. ELECTIONS — Distinguishing Marks on Ballots. — Under the statute which provided that the stamp should be against the "yes" or "no" in ballots on constitutional questions, stamping under the word was not a distinguishing mark invalidating the ballot.—Hannah v. Green, Cal., 76 Pac. Rep. 708.

84. ELECTRICITY — Negligent Contact with Other Wires.—Electric light company held liable where it negligently permits its wire to come in contact with that of another.—Daltry v. Media Electric Light, Heat & Power Co., Pa., 57 Atl. Rep. 833.

85. EQUITY—Failure to Insist on Demurrer.—Failure of a defendant, who had demurred to a bill, to be present and insist that the issue presented by his demurrer be disposed of, did not constitute a waiver thereof.—Joest v. Adel, Ill., 70 N. E. Rep. 638.

86. ESTOPPEL—Acknowledgment of Child at Heir. — Deeds by a widow, naming one as child and heir of decedent, held not to estop her or her heirs from denying that such a one was her child or heir in a controversy concerning other property.—Stone v. Salisbury, Ill., 70 N. E. Rep. 605.

87. ESTOPPEL — Execution Sale. — Where a creditor stands by during an execution sale of his debtor's property, and by his silence conceals his own hostile title his own title, as well as that of the debtor, will pass by estoppel under the sheriff's deed.—Brady v. Carteret Realty Co, N. J., 57 Atl. Rep. 814.

88. EMINENT DOMAIN—Abatement of Public Nuisance. —Public nuisance may be abated, and benefits assessed against owner of land on which it is situated, without making such abatement an exercise of power of eminent domain.—Rude v. Town of St. Marie, Wis., 99 N. W. Rep. 460.

89. EMINENT DOMAIN—Acceptance of Award in Condemnation Proceedings.—Where a property owner accepts and retains the damages assessed in condemnation proceedings, he is precluded from claiming greater damages, either in a direct appeal or in a collateral action.—Stauffer v. Cincinnati, R. & M. R. Co., Ind., 70 N. E Rep. 543.

90. EMINENT DOMAIN - Land Taken for Public Road.—The owner of land taken for a public road may enjoin the use of the same until his damages have been ascertained and paid, or provision made therefor.—Kime v. Cass County, Neb , 99 N. W. Rep. 546.

91. EVIDENCE—Certified Copy of Judgment.- In action on judgment, certified copy of the judgment roll, held properly admitted in evidence, under Acts 1896, p. 108, ch. 101.—Wise v. Keer Thread Co., Miss., 36 So. Rep. 244.

92. EVIDENCE—Conversion.—Records of county treasurer, showing assessed value of property, are inadmissible in an action for its conversion.—Carper v. Risdon, Colo., 76 Pac. Rep. 744.

93. EVIDENCE—Examination of Book of Accounts.—Where a book contains voluminous accounts, an accountant, who has examined them, may testify as to the result of his computation.—Mendel v. Boyd, Neb., 99 N. W. Rep. 493.

94. EVIDENCE—Letters —A letter as to a conversation with defendant, but giving only the writer's conclusion therefrom, held incompetent.—Trust Co. v. Benbow, N. Car., 47 S. E. Rep. 435.

95. EVIDENCE — Receipt for an Advancement.—Where a parent takes a note payable to himself from a child, his declarations are admissible to show that the note was taken as a mere receipt for an advancement. — Strode v. Beall, Mo., 79 S. W. Rep. 1019.

96. EVIDENCE — Settlement of Decedent's Estate.—Evidence in a suit for the settlement of a decedent's estate examined, and held to sustain a decision reducing claim for $600 for attorney's fees to $150 —Clarke v. Garrison, Ky., 79 S. W. Rep. 240.

97. EXECUTION—Assertion of Hostile Title.—Injunction will lie to restrain owner of judgment from selling property of judgment debtor on execution, and claiming on sale that the judgment debtor has no interest of value in the property.—Brady v. Carteret Realty Co., N. J., 57 Atl. Rep. 814.

98. EXECUTORS AND ADMINISTRATORS—Discharge of Administrators —A probate court has jurisdiction to set aside at a subsequent term an order discharging an executor.—Heppe v. Szczepanski, Ill., 70 N. E. Rep. 737.

99. EXECUTORS AND ADMINISTRATORS—Expenditures for Legatees.—An executor held not entitled to credits for payment of taxes on land of his wife, who was residuary legatee, or for defraying her expenses on a trip. —Bean v. Bean, N. Car., 47 S. E. Rep. 282.

100. EXECUTORS AND ADMINISTRATORS — Individual Liability.—One contracting to make certain payments to the heirs and distributees of an estate held bound individually on thereafter becoming executrix of the estate —Painter v. Kaiser, Nev., 76 Pac. Rep. 747.

101. EXECUTORS AND ADMINISTRATORS — Power of Court to Revoke Decree.—After decree of distribution, inadvertently made by the probate court, the court at a later term, before the decree has been acted upon can annul and revoke it.—*In re* Cote's Estate, Me., 57 Atl. Rep. 584.

102. EXECUTORS AND ADMINISTRATORS — Probating Claim not Itemized.—A statement in writing of a claim against decedent's estate, without any itemization, held sufficient under Code 1892, § 1932.—Foster v. Shaffer, Miss., 36 So. Rep. 243.

103. FRAUDULENT CONVEYANCES—Burden of Proof.—

That the grantor and grantee in an alleged fraudulent conveyance are relatives held not to change the burden of proof in action by creditor to set such conveyance aside.—American Hoist & Derrick Co. v. Hall, Ill., 70 N. E. Rep. 581.

104. FRAUDULENT CONVEYANCES—Right of Surety on Defendant's Bail Bond.—A surety on defendant's bail bond, who pays the judgment recovered by plaintiff in trover, is entitled to the protection of the statute against fraudulent conveyances.—Banks v. McCandless, Ga., 47 S. E. Rep. 332.

105. FRAUDULENT CONVEYANCES—Sufficiency of Petition.—Assignee of note, suing in attachment, need not set up in answer to intervener that conveyance to him by maker of note was in fraud of creditors.—House v. Johnson, Colo., 76 Pac. Rep. 743.

106. FENCES—Malicious Mischief.—One accused of injuring another's fence can not justify merely on the ground that he has some title or claim to the land.—Smith v. State, Tex., 17. S. W. Rep. 34.

107. FIRE INSURANCE—Concealment of a Material Fact.—Mere failure of insured to mention that a gambling concern was connected with his insured saloon not such a concealment of a material fact as to avoid the policy.—American Cent. Ins. Co. v. Nunn, Tex., 79 S. W. Rep. 88.

108. FIRE INSURANCE—Mortgagee's Interest.—A suit on a policy payable to a mortgagee in case of loss for the mortgagor's account held properly brought in the name of mortgagor for the mortgagee's use.—Hartford Fire Ins. Co. v. Peterson, Ill., 70 N. E. Rep. 757.

109. FIRE INSURANCE—Proof of Loss—If the furnishing of proof of loss is a conditton precedent to action upon insurance policy, performance or waiver of it must be shown.—Munson v. German-American Fire Ins. Co., W. Va., 47 S. E. Rep. 160.

110. GAMING—Municipal Regulation of Pool Selling.—The act of pool selling or betting on pools is not a game, within Ky. St. 1903, § 1978, providing a penalty for those permitting any game in which money is bet on their premises.—City of Louisville v. Wehmoff, Ky., 79 S. W. Rep. 201.

111. GAMING—Playing Poker with Chips.—Fact that a game of poker was played with chips, instead of with money, held not to relieve the winner from liability, under Hurd's Rev. St. 1901, ch. 38, § 132.—Zellers v. White, Ill., 70 N. E. Rep. 669.

112. GIFTS—Bank Accounts.—Where deposit to joint account of parent and child is merely for parent's convenience, a subsequent change of intention, so as to establish a gift to the child after the parent's death, must be clearly established.—Taylor v. Cornell, N. J., 57 Atl. Rep. 810.

113. GRAND JURY—Challenge to Panel.—That accused was in jail does not render him unable to challenge individual grand juror, and is no reason for dismissing indictment.—People v. Borgstrom, N. Y., 70 N. E. Rep. 780.

114. GUARANTY—Action Against Surety.—In an action against a surety on a note involving a cotemporaneous written agreement, held, that demand on the note alone was sufficient—Ewen v. Wilbor, Ill., 70 N. E. Rep. 575.

115. HOMICIDE—Erroneous Admission of Evidence in Absence of Accused.—On a prosecution for murder, testimony of a witness as to a statement of deceased, made in the absence of defendant and having an effect prejudicial to him, held erroneously admitted.—Boyd v. State, Miss., 36 So. Rep. 525.

116. HOMICIDE—Self-Defense.—If one, after provoking a difficulty, abandons the conflict, and is subsequently murderously assaulted, and kills in self-defense, he is not estopped to plead self-defense.—Jones v. State, Miss., 36 So. Rep. 243.

117. HUSBAND AND WIFE—Infan Married Woman.—A wife may, without the consent of her husband, make eases of her land for periods not longer than three years.—Shipley v. Smith, Ind., 70 N. E. Rep. 603.

118. HUSBAND AND WIFE—Mortgage to Pay Husband's Debts.—Promise of wife to mortgage property to pay her husband's debts could be availed of by a surety on one of her husband's notes.—Hamilton v. Hamilton, Ind., 70 N. E. Rep. 555.

119. INJUNCTION—Remedy of Law.—Complete remedy at law alone will not prevent injunction, but remedy must be plain and adequate.—Stauffer v. Cincinnati, R. & M. R. Co., Ind., 70 N. E. Rep. 543.

120 INJUNCTION—Irreparable Injury—Where a party binds himself in a sum certain not to carry on a certain business within a fixed territory, though the damages are liquidated, the obligee has the option to proceed in law or in equity.—Augusta Steam Laundry Co v. Debow, Me., 57 Atl. Rep. 845.

121. INTERPLEADER—Burden of Proving Deed Absolute.—The burden of proof is on a party, claiming that an absolute deed is a mortgage, to sustain his claim by convincing evidence.—Gannon v. Moles, Ill., 70 N. E. Rep. 689.

122. INTERPLEADER—Conveyance of Stock.—Conduct of a bank held not to estop it from filing a bill of interpleader to compel one in whose name stock stood to litigate his rights to it.—Dickinson v. Griggsville Nat. Bank, Ill., 70 N. E. Rep. 598.

123. INTOXICATING LIQUORS—Illegal Sale at Drug Store.—An indictment for suffering liquor to be drunk at the place of business of a druggust need not name the person who was so permitted to drink.—State v. McAnally, Mo., 79 S. W. Rep. 990.

124. INTOXICATING LIQUORS—Sale for Medical Purposes.—Sales of liquor for medical purposes are not within the statutes prohibiting sales to minors.—Atkinson v. State, Tex., 79 S. W. Rep. 31.

125. JUDGMENT—Decision on Jurisdiction.—Adjudication of appellate court that order modifying a decree rendered at previous term was beyond power of trial court held not *res judicata* of merits.—Barkman v. Barkman, Ill., 70 N. E. Rep. 652.

126. JUDGMENT—Fraud in Procuring.—A judgment will not be set aside for fraud, except on satisfactory proof that it occurred in the very "concoction or procurement" of the judgment.—Pelz v. Bollinger, Mo., 79 S. W Rep. 146.

127 JUDGMENT—Justices of the Peace.—Under Code 1892, § 2413, judgments rendered by justices of the peace may be enrolled in any county in the state.—Wise v. Kerr Thread Co., Miss., 36 So. Rep. 244.

128. JUDICIAL SALES—Agreement to Chill Bidding.—Agreement to chill bidding at judicial sale, to which all parties in interest are parties, will not vitiate the sale.—Fairey v. Kennedy, S. Car., 47 S. E. Rep. 138.

129. JUSTICES OF THE PEACE—Appearance.—Lack of service held cured by defendant coming into court, asking for a *recordari*, and trying the cause on its merits—Johnson v. Grand Fountain of United Order of True Reformers, N. Car., 47 S. E. Rep. 463.

130. LANDLORD AND TENANT—Title to Crops.—That a cropper furnishes the labor necessary to the making of a crop and is to receive a portion thereof does not make him a partner.—De Loach v. Delk, Ga., 47 S. E. Rep. 204.

131. LANDLORD AND TENANT—Waiver of Landlord's Lien.—Holder of rent notes given by tenant of land held estopped to set up a lien as against those who had made advances to the tenant.—Dreyfus v. W. A. Gage & Co., Miss., 36 So. Rep 248.

132. LIFE ESTATES—In Personalty.—An estate for life may be created in personalty of a durable nature, with remainder over.—Dickinson v. Griggsville Nat. Bank, Ill., 70 N. E. Rep. 598.

133. LIFE ESTATES—Right of Surviving Husband.—Where a grantor conveying land reserves a life estate, the surviving husband of the grantee, dying in the grantor's lifetime, has no present interest in the land conveyed.—Stebbins v. Petty, Ill., 70 N. E. Rep. 673.

134. LIFE INSURANCE—Second Wife's Interest.—A second wife held to have had no interest in a life policy on husband's life, payable to deceased first wife and testator's children.—Bickel v. Bickel, Ky., 79 S. W. Rep. 215.

135. LIS PENDENS — Purchaser Pendente Lite. — A grantee in a trust deed to secure a debt, executed after the entry of a decree of a sale of the land under mortgage foreclosure and before the sale is a purchaser *pendente lite*.—Senft v. Vanek, Ill., 70 N. E. Rep. 720.

136. LOTTERIES — "Gift Enterprise."—Manufacturers and dealers in trading stamps held not engaged in a gift enterprise," within Winston City Charter, § 65, subsec. 11.—City of Winston v. Beeson, N. Car., 47 S. E. Rep. 457.

137. MANDAMUS — Municipal Corporation Contracts.—The courts will not by *mandamus* compel a borough to publish an ordinance containing a contract by the borough with an individual, so as to complete the contract.—Carpenter v. Yeadon Borough, Pa., 57 Atl. Rep. 837.

138. MANDAMUS — Against Judge. — A judge, against whom a writ of *mandamus* is granted, is not liable in damages to plaintiff, under Rev. St. 1887, § 4987.—Hill v. Morgan, Idaho, 76 Pac. Rep. 765.

139. MASTER AND SERVANT—Assumption of Risk.—The doctrine of assumption of obvious risks does not apply where a servant is ordered to do work out of the line and away from the place of work he is hired to do.—American Car & Foundry Co. v. Clark, Ind., 70 N. E. Rep. 828.

140. MASTER AND SERVANT — Assumption of Risk. — Common laborer, put to work around dangerous machinery, held not as a matter of law to have assumed the risk.—Merrifield v. Maryland Gold Quartz Min. Co., Cal., 76 Pac. Rep. 710.

141. MASTER AND SERVANT — Failure of Railroad to Furnish Modern Appliances.—Failure of a railroad company to furnish stock gaps such as are furnished on well-regulated railroads generally held not to establish negligence as matter of law, in action to recover for the wrongful death of an employee.—Northern Alabama Ry. Co. v. Mansell, Ala., 36 So. Rep. 459.

142. MASTER AND SERVANT—Telegraph Operator and Fireman Fellow Servants.—Negligence of a local telegraph operator and station agent of a railway company in observing and reporting to train dispatcher the movement of trains, which caused the death of a fireman on such railway, held the negligence of a fellow servant.—Northern Pac. Ry. Co. v. Dixon, U. S. S. C., 24 Sup. Ct. Rep. 683.

143. MORTGAGES — Payment in Chattels. — Where executory process is issued for too large an amount, all proceedings had after the grant of the order of seizure and sale will be set aside, and plaintiff taxed with the costs.—Iberia Cypress Co. v. Christen, La., 36 So. Rep. 491.

144. MORTGAGES—Purchase at Tax Sale.—Purchase at tax sale of one tract conveyed by mortgage satisfies the debt, as to other tracts conveyed, only to the value of the tract purchased.—*Ex parte* Powell, S. Car., 47 S. E Rep. 440.

145. MUNICIPAL CORPORATION — Powers of City Council.—A city council has power to direct the payment of salary to a policeman and of a bill for paving.—Riggins v. Richards, Tex., 79 S. W. Rep. 84.

146. MUNICIPAL CORPORATION — Removing Dangerous Buildings.—General grants of power in city charter held not to authorize ordinance requiring agents to remove dangerous buildings.—City of St. Louis v. J E. Kaime & Bro. Real Estate Co., Mo., 79 S. W. Rep. 140.

147. NAMES—Jury List.—Where a juror summoned was one C, "Jr.," that the description "Jr." was omitted in the jury list served on the accused does not affect the legality of the service.—State v. Cafiero, La., 36 So. Rep. 492.

148. NEGLIGENCE — Relation of Teacher to Pupil.—A teacher has authority to correct a pupil, and any atc in the exercise of authority is not actionable, though it causes permanent injury, unless a person of ordinary prudence could reasonably have foreseen such injury.—Drum v. Miller, N. Car., 47 S. E. Rep. 421.

149. PARTITION — Claims Against Joint Estate. — On partition of real property, taxes paid by a co-tenant were properly charged against the estate.—Walker v. Williams, Miss., 36 So. Rep. 450.

150. PRINCIPAL AND SURETY—Right to Foreclose Mortgage.—Plaintiff, on producing a note and a copy of the act of mortgage, securing the same, held entitled to foreclose.—Iberia Cypress Co. v. Christen, La., 36 So. Rep. 490.

151. RAILROADS — Concurrent Negligence. — Doctrine of last clear chance applies where defendant knows of plaintiff's danger and fails to do something which he can do to avoid injury, but has no application where both parties are guilty of concurrent acts of negligence.—Green v. Los Angeles Terminal Ry. Co., Cal., 76 Pac. Rep. 719.

152. SET-OFF AND COUNTERCLAIM—Bills and Notes.—Unliquidated damages arising out of contracts or covenants disconnected from the subject-matter of the plaintiff's claim are not such claims or demands as constitute the subject-matter of set-off under the statute.—Ewen v. Wilber, Ill., 70 N. E. Rep. 575.

153. SHERIFFS AND CONSTABLES—Enforcement of Execution. — An officer may lawfully enforce execution in his hands until he has official information of the superseding of the judgment on which it was issued.—Western Seed & Irrigation Co. v. McDonald, Neb., 99 N. W. Rep. 517.

154. SHERIFFS AND CONSTABLES — Time for Recovery of Fees.—A sheriff's charges for securing and keeping attached property may be recovered of the plaintiff before the termination of the suit in which the attachment issued.—Templeton v. Capital Sav. Bank & Trust Co., Vt., 57 Atl. Rep. 818.

155. SPECIFIC PERFORMANCE—Contract of Lease.—In a suit by a lessee for specific performance of a contract of lease and damages, the owner and the original lessee and a third person to whom the premises were fraudulently leased are proper codefendants.—Briel v. Postal Telegraph Co., La., 36 So. Rep. 477.

156. SPECIFIC PERFORMANCE—Inadequacy of Consideration.—Mere inadequacy of consideration is not a sufficient reason for refusing specific performance.—Hamilton v. Hamilton, Ind., 70 N. E. Rep. 535.

157. SPECIFIC PERFORMANCE—Laches. — Unexplained delay of five years held such laches as will defeat specific performance of contract to convey right of way.—Bauer v. Lumaghi Coal Co., Ill., 70 N. E. Rep. 634.

158. SPECIFIC PERFORMANCE—Sale of Land.—Contract for sale of realty held unequal, so as not to be susceptible of specific enforcement by the vendor.—Goodwine v. Kelley, Ind., 70 N. E. Rep. 832.

159. SPECIFIC PERFORMANCE — Time as Essence of Contract.—Payment of price on dates named in contract of sale held not essential to right of vendees to enforce specific performance.—Vance v. Newman, Ark., 80 S. W. Rep. 574.

160. STATUTES — Constitutional Law. — To the extent that a statute is illegal it does not effect the repeal of any law.—State v. Dalcourt, La., 36 So. Rep. 479.

161. STATUTES—Construction where Effect is to Repeal Former Statute.—A construction of a statute which in effect repeals another statute will not be adopted, unless made necessary by the evident intent of the legislature.—Schafer v. Schafer, Neb., 99 N. W. Rep. 482.

162. STREET RAILROADS—Obstructions Causing Injury to Bicyclist.—Astreet railroad held not liable to plaintiff for injuries owing to his having ridden his bicycle into an obstruction in the street, placed there by operatives of a car on removing it from the track.—Howard v. Union R. Co., R. I., 57 Atl. Rep. 867.

163. TAXATION—Property in the Hands of Trustee in Bankruptcy.—Property in the hands of a trustee in bankruptcy held not exempt from liability to state taxation by Bankr. Act 1898.—Swarts v. Hammer, U. S. S. C., 24 Sup. Ct. Rep. 695.

164. TAXATION—Tax Sale.—A tutor is not permitted to himself acquire adversely to the minors the ownership of their property at a tax sale under an assessment in the name of a third person.—Ingram v. Heintz, La., 36 So. Rep. 507.

165. TAXATION—Want of Notice.—Where property was subject to taxation, want of notice, the insufficiency thereof, or any other irregularity will not authorize the issuance of an injunction restraining the collection of a tax levied thereon.—McCrory v. O'Keefe, Ind., 70 N. E. Rep. 812.

166. TENANCY IN COMMON—Accounting.—A co-tenant is entitled to the cost of improvements put by him on the land in excess over his proportionate part.—Bennett v. Bennett, Miss., 36 So. Rep. 452.

167. TRADE UNIONS—Illegal Expulsion.—Member of voluntary unincorporated trade union, illegally expelled, held entitled to sue in the state courts to compel reinstatement and to enjoin defendants from preventing him from working at his trade.—Corregan v. Hay, 87 N. Y. Supp. 956.

168. TRIAL—Argument of Counsel.—Whether, after argument by plaintiff, the defense can cut off further argument by waiving argument on his own behalf, is in the discretion of the court.—Henry v. Dussell, Neb., 99 N. W. Rep. 484.

169. TRIAL—Agreement to Convey Land.—Where the obligor in a bond for a deed has agreed that it shall include a release of dower, the decree for specific performance can require him to make every reasonable exertion to comply with his contract.—Handy v. Rice, Me., 57 Atl. Rep. 847.

170. TRIAL—Computation by Judge.—Action of trial judge in computing and including interest in judgment against railroad for damage to property caused by fire originating from passing locomotive held proper.—Louisville & N. R. Co. v. Fort, Tenn., 80 S. W. Rep. 429.

171. TRIAL—Demurrer to Evidence.—A motion, made at the close of the evidence, "that the court find the issues for the defendants," is in effect a demurrer to the evidence.—Crerar v. Daniels, Ill., 70 N. E. Rep. 569.

172. TRUSTS—Accounting.—A trustee should not be allowed credit for money, alleged to have been paid for a judgment against the trust estate, merely on his own testimony.—Willis v. Klymer, N. J., 57 Atl. Rep. 847.

173. TRUSTS—Constructive Trustees.—Where defendants without authority collected plaintiff's share of her ancestor's estate, they became constructive trustees, and limitations began to run from time of notice to plaintiff.—Bridgens v. West, Tex., 80 S. W. Rep. 417.

174. TRUSTS—Determinable Remainder.—A trust held not to fail because of uncertainty in whom the fee will vest in case the first beneficiary dies leaving no issue.—Orr v. Yates, Ill., 70 N. E. Rep. 731.

175. TRUSTS—Expenses in Defending Against Adversary Proceedings.—One of several parties having a common interest in a trust fund, who takes proceedings for its protection, is entitled to reimbursement out of the fund itself or by contribution.—Somerset Ry. v. Pierce, Me., 57 Atl. Rep. 888.

176. TRUSTS—Purchaser with Knowledge.—One who takes a conveyance of land which the owner had agreed to convey to another, with full knowledge of the bond and the conditions thereof, holds as trustee of the obligee in the bond.—Handy v. Rice, Me., 57 Atl. Rep. 847.

177. UNITED STATES—Descent and Distribution.—Legatees of deceased heirs held entitled to share with living heirs in the distribution of an appropriation made to the administrator of their common ancestor.—Nutt v. Forsythe, Miss., 36 So. Rep. 247.

178. WILLS—Life Policy as a Specific Legacy.—Excess of the face value of an insurance policy bequeathed by testator held not specifically devised.—Waters v. Hatch, Mo., 79 S. W. Rep. 916.

179. WILLS—Note Given for Advancement.—Note in possession of a decedent held a receipt for an advancement to a daughter.—Strode v. Beall, Mo., 79 S. W. Rep. 1019.

180. WILLS—Stock Dividends.—A stock dividend, issued after death of testator, held no intestate property, but to pass to remaindermen under a clause of the will devising stock.—Blinn v. Gillett, Ill., 70 N. E. Rep. 704.

181. WILLS—Testamentary Capacity.—A judgment of the supreme court in a will contest in which the executor was the proponent, affirming the decision of the trial court finding against the validity of the will, will be against the executor in his official capacity.—Hess v. Killebrew, Ill., 70 N. E. Rep. 675.

182. WILLS—Testamentary Capacity.—It is not necessary that the testator possess high strength of mind to make a valid will, nor that he have as strong mind as he formerly had.—Stewart v. Lyons, W. Va., 47 S. E. Rep. 442.

183. WILLS—Undue Influence.—Will of testatrix, by which she gave her estate to her pastor and his family, to the exclusion of distant relatives, sustained, in absence of evidence of undue influence.—Caughey v. Bridenbagh, Pa., 57 Atl. Rep. 821.

184. WILLS—What Law Governs.—The validity of the will of a decedent, so far as it depended on its due execution, held required to be determined by the laws of the state of the testator's domicile.—Davis v. Upson, Ill., 70 N. E. Rep. 602.

185. WITNESSES—Competency of Testimony.—On a prosecution for murder, it was error to permit a witness for the state to testify that had testified to the same fact at the preliminary examination.—Boyd v. State, Miss., 36 So. Rep. 525.

186. WITNESSES—False Testimony.—Where the testimony of a witness is false in some material portion, all of the testimony of such witness is not to be rejected merely because of that fact.—Suckow v. State, Wis., 99 N. W. Rep. 440.

187. WITNESSES—Impeachment.—In order to attack the credibility of the prosecuting witness, he may be asked on cross-examination whether he had offered to withdraw the affidavit against the accused as executed in error.—State v. Dalcourt, La., 36 So. Rep. 479.

188. WITNESSES—Impeachment.—After evidence of contradictory statements by a witness by way of impeachment, it is incompetent to show that he had made statements in accordance with his testimony at the trial.—State v. McDaniel, S. Car., 47 S. E. Rep. 884.

189. WITNESSES—Impeachment.—Testimony by the state as to the account of a transaction given by a witness for the state previous to the trial held admissible in rebuttal, an attempt having been made to impeach such witness.—Waller v. People, Ill., 70 N. E. Rep. 681.

190. WITNESSES—Inconsistent Testimony.—An instruction that jury might disregard evidence of witness who has intentionally sworn to statements inconsistent with his testimony held erroneous.—Doyle v. Burns, Iowa 99 N. W. Rep. 195.

191. WITNESSES—Transactions With Deceased Persons.—In an action to determine a controversy as to the location of certain land, defendant was not entitled to testify to a transaction between himself and others, who were dead at the time of the trial.—Board of Park Comrs. of City of Louisville v. Marrett, Ky., 80 S. W. Rep. 166.

192. WITNESSES—Transactions with Decedent.—In a suit against the representatives of a decedent to set aside a conveyance to decedent as obtained by his fraud, the deposition of plaintiff as to transactions with the decedent was inadmissible.—Turner's Trustee v. Washburn, Ky., 80 S. W. Rep. 460.